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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY
AND OHIO POWER COMPANY,
Petitioners,

vs.

UNITED MINE WORKERS OF AMERICA,

UNITED MINE WORKERS OF AMERICA,
DISTRICT No. 6,

AND UNITED MINE WORKERS OF AMERICA,
LOCAL Nos. 1890, 1886 AND 1957,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Southern Ohio Coal Company and Ohio Power Company, pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on February 11, 1977.

I. OPINIONS BELOW

The February 11, 1977 Opinion of the Court of Appeals, not yet officially reported but appearing at 94 LRRM 2609, rendered in six cases which had been consolidated for consideration, appears in the Appendix to this Petition for Writ of Certiorari. The unreported Opinions of the United States District Court for the Southern District of Ohio were rendered on April 23, 1975, June 19, 1975, August 14, 1975, September 9, 1975, and August 4, 1976. Each of these Opinions appears in the Appendix to this Petition for Writ of Certiorari.

II. JURISDICTION

Individual judgments were made and entered on February 11, 1977, by the United States Court of Appeals for the Sixth Circuit in the six cases which had been consolidated for consideration. A copy of each judgment appears in the Appendix to this Petition for Writ of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

(A) Can a federal district court, in an action under 29 U.S.C. § 185, enjoin a labor union from engaging in a pattern or practice of striking over issues which are arbitrable under a collective bargaining agreement when that union has engaged in a series of strikes over numerous issues which are sometimes distinct as to specifics but which are all arbitrable under that agreement?

(B) Is a labor union, whose members at a particular work site repeatedly engage in strikes over issues which are arbitrable under a collective bargaining agreement, liable for the actions of those members when all or substantially all of such members engage in such strikes and/or when the union, with

knowledge of past strikes by such members over arbitrable issues and possessing the power and authority to undertake such action, has taken no action which can reasonably be expected to prevent further such strikes or takes no such action to end an existing strike?

(C) Can a federal district court issue injunctive relief or enforce a previously issued injunction against a local union which is engaged in a strike at a particular work site by refusing to cross the picket line of fellow members of the same international union if the picket line is in support of an illegal strike over an issue which is arbitrable under the single collective bargaining agreement covering both the union members who are picketing and those who refuse to cross the picket line?

IV. STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 101. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

[United States Code, Vol. 7, p. 7991 (1970)]

§ 102. Public policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

[United States Code, Vol. 7, p. 7991 (1970)]

§ 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions.

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

[United States Code, Vol. 7, p. 7993 (1970)]

§ 185. Suits by and against labor organizations.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of

another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

[United States Code, Vol. 7, p. 8014 (1970)]

V. STATEMENT OF THE CASE

This case was before the United States Court of Appeals for the Sixth Circuit on six consolidated appeals from four orders of the United States District Court for the Southern District of Ohio in a case arising from a series of work stoppages at three coal mines owned and operated by Ohio Power Company and Southern Ohio Coal Company [hereinafter collectively "the Company"] – Meigs No. 1, Meigs No. 2 and Raccoon No. 3. The miners employed at these mines are members of the United Mine Workers of America, its District No. 6, and its Locals 1890, 1886 and 1957. Southern Ohio Coal Company and the United Mine Workers are signatories to the National Bituminous Coal Wage Agreement of 1974.

On April 14, 1975, the Company filed an amended complaint in the District Court seeking injunctive relief and damages for breach of the collective bargaining agreement. The mandatory arbitration provision of that agreement states:

> Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

The Sixth Circuit found that this section provides a five-step procedure, culminating in arbitration, for the purpose of resolving all disputes arising between the parties. The parties

also agreed to "maintain the integrity" of the contract by utilizing this provision to settle "all disputes and claims" save those "national in character."

Jurisdiction was based on 29 U.S.C. § 185. Named as defendants were the International, its District No. 6, and its Locals 1890, 1886 and 1957. The amended complaint stated that the union members employed at the three mines were engaged in a continuing practice of striking over arbitrable grievances in violation of the no-strike pledge implied from the mandatory arbitration clause. It also alleged that the strikes had been condoned and encouraged by the International and its District No. 6.

The initial motions for preliminary injunctions were denied by the District Court for the reason that the particular work stoppages in existence at the time of the filing of the amended complaint had ceased, but the Court warned that future work stoppages during the pendency of the action could result in injunctive relief for the Company.

On May 28, 1975, the employees at Raccoon No. 3, who are members of the International, District No. 6, and Local No. 1957, failed again to report for work. This work stoppage was caused by the assignment of a supervisor to whom the miners objected. The members of Local No. 1957 again failed to report for work on June 2, 1975. This time, the strike was occasioned by a computer error that shortchanged a number of miners' pay checks. On June 19th, the District Court granted a preliminary injunction against Local 1957 but declined to extend the order to District No. 6 and the International. The Court found that the work stoppages of May 28 and June 2 resulted from disputes over arbitrable grievances and, therefore, violated the union's no-strike obligation. The District Court also found that these strikes were only the latest of a series of stoppages over arbitrable disputes where the miners failed to file grievances but simply closed the Raccoon Mine No. 3 for a short period, and it noted that the Company was ready and willing to arbitrate the grievances. Finally, the District Court determined that a pre-

liminary injunction was warranted under ordinary equity principles because the Company was suffering irreparable injury from the repetitious work stoppages and would suffer more from the denial of injunctive relief than would the union from its granting.

The District Court enjoined Local 1957 to use the arbitration provision and not strike to resolve arbitrable grievances:

> To refrain from engaging in any further work stoppage at Raccoon No. 3;
>
> To refrain from committing, doing, uttering, writing, or communicating, any word, act, or deed, written, spoken or performed which is intended, designed or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of the defendant to report for work or to work at Raccoon No. 3;
>
> To utilize the grievance and arbitration procedures of the National Bituminous Coal Wage Agreement of 1974, with respect to arbitrable grievances; and
>
> To take all action which may be necessary to assure compliance with the terms of the National Bituminous Coal Wage Agreement of 1974.

An appeal by the Company from the denial of relief as to the International and District No. 6 and an appeal by Local 1957 from the grant of relief followed this Order.

On July 28, 1975, the union members at the Meigs No. 2 Mine failed to report for work. The Company sought a preliminary injunction against the International, its District No. 6, and its Local No. 1886. A hearing was set for August 11, 1975, but the District Court denied the requested relief without receiving evidence of any facts after being informed at the outset of the hearing that the work stoppage, which had been in progress for two weeks, had terminated a few hours prior to the commencement of the hearing. An appeal by the Company from the denial of relief followed this Order.

On August 19, 1975, mine workers at all three mines failed

to report for work. The Company sought preliminary injunctive relief against Locals 1886 and 1890, District No. 6 and the International, and sought contempt against Local 1957. The District Court found that these work stoppages were primarily attributable to the Company's distribution to its supervisory personnel of a document entitled "Guidelines for Dealing with Mine Health and Safety Committee." The District Court also noted that the presence of non-employee pickets at the mine sites and the shooting of a member of Local 1886 contributed to the prolonging of these work stoppages. As before, the District Court found that no grievances had been filed regarding the disputes and that the strikes were over arbitrable issues and, thus, in violation of the union's implied no-strike agreement. The District Court stated that there had been ample demonstration by the Company of a pattern of activity by the local unions reflecting disregard of the contractual provisions of the parties' collective bargaining agreement and showing a probability that the local unions would continue such strikes whenever they again became dissatisfied with some condition of work at the mines. The District Court concluded that the equities supported issuance of preliminary injunctions against Locals 1886 and 1890, and it entered orders identical to the decree imposed on Local 1957. However, the District Court refused to extend the injunctions to District No. 6 and the International at any of the three mines. An appeal by the Company from the denial of relief as to the International and District No. 6 and a joint appeal by Locals 1890 and 1886 from the grant of relief followed this Order.

In July, 1976, the mines were again closed. This shutdown was caused by the union members' refusal to cross picket lines set up at the mine sites by United Mine Workers' members employed at mines other than the three subject mines. The Company filed motions for orders to show cause why each local union should not be held in contempt on the basis that the refusal to cross the picket lines or arbitrate the disputes were violations of the preliminary injunctions. The

District Court denied the motions, without hearings, on the authority of this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), which had been decided in the interim since the preliminary injunctions were issued. The District Court found the miners' refusal to cross the picket lines to be protected activity and not subject to injunction. Finally, the District Court concluded that *Buffalo Forge* placed in question the breadth of the preliminary injunctions and required the denial of the Company's motions for orders to show cause under the then existing circumstances. An appeal by the Company from the denial of relief followed this Order.

On appeal, the Sixth Circuit affirmed the District Court's findings that the series of work stoppages giving rise to each preliminary injunction against each of the three local unions involved issues which the union was contractually bound to arbitrate, that the equities supported issuance of each injunction, and that the guidelines established in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), had been properly applied in issuing each injunction. The Sixth Circuit also affirmed the District Court's refusal to extend the preliminary injunctions to the International and its District No. 6, rejecting the application of certain agency principles as required by 29 U.S.C. § 185 and applied by the Third Circuit in *Eazor Express, Inc.* v. *Int'l. Brotherhood of Teamsters*, 520 F. 2d 951 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976), and other Courts of Appeals, *e.g.*, *Wagner Electric Corp.* v. *Local 1104, Int'l. Union of Electrical, Radio and Machine Workers*, 496 F. 2d 954 (8th Cir. 1974); *Vulcan Materials Co.* v. *United Steelworkers of America*, 430 F. 2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971). It noted that, while a union's "studied ambivalence" toward a work stoppage may constitute sufficient inducement, encouragement, and condonation of a strike to expose it to injunctive relief and damages, there was no encouragement, condonation or inducement of the strikes through either action or inaction

on the part of the International or District No. 6, in these proceedings.

The Sixth Circuit further determined that, consistent with *Boys Markets*, prospective injunctive relief, encompassing future strikes over disputes in areas which have caused stoppages in the past, could be granted to preserve the national policy of fostering arbitration where a union has engaged in a continuing practice of striking over arbitrable disputes and the *Boys Markets* guidelines are satisfied. However, in determining the permissible scope and requisite clarity of such injunctions, the Sixth Circuit stated that, while *Boys Markets* permitted the grant of prospective relief, § 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109, required a narrow injunction. On this basis, the Court vacated the previously issued preliminary injunctions. In adopting this view, the Sixth Circuit rejected the conclusion of the Seventh Circuit in *Old Ben Coal Corp.* v. *Local No. 1487, United Mine Workers*, 500 F. 2d 950 (7th Cir. 1974), that a showing of a past pattern and practice of striking over arbitrable issues warranted the broader restraint on future strike activity which mirrored the past pattern and practice of striking over arbitrable issues in order to relieve the aggrieved party of the irreparable injury caused by numerous work stoppages. It likewise declined to follow the underlying rationale to the same effect which is reflected in the decisions of the Ninth Circuit, *Donovan Construction Co.* v. *Construction, Production & Maintenance Laborers Union, Local 383*, 533 F. 2d 481 (9th Cir. 1976), and the Tenth Circuit, *CF&I Steel Corp.* v. *United Mine Workers of America*, 507 F. 2d 170 (10th Cir. 1974).

The Sixth Circuit also affirmed the District Court's denial of the Motions for Orders to Show Cause against the three locals filed by the Company in July, 1976. The Court concluded, as had the District Court, that *Buffalo Forge Co.* v. *United Steelworkers of America, supra*, controlled the disposition of the Company's motions, even though the pickets at each of the Company's three mines were seeking support of a strike in violation of the mandatory arbitration provisions

of the same collective bargaining agreement as that which covered the Company's striking employees and in spite of differences in wording between the arbitration clause in *Buffalo Forge* and that in the instant case.

VI. REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the United States Court of Appeals for the Sixth Circuit should be reviewed and reversed because:

(A) as to the permissible scope of injunctive relief, it conflicts with decisions of this Court such as *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), and *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974), insofar as those decisions are grounded in the federal labor policy of promoting the utilization of the arbitration provisions of a collective bargaining agreement through the use of the remedial mechanism of injunctive relief to the extent necessary to preserve such arbitration process; it conflicts with decisions of other Courts of Appeals [such as, *Old Ben Coal Corp.* v. *Local 1487, United Mine Workers*, 500 F. 2d 950 (7th Cir. 1974); *Donovan Construction Co.* v. *Construction, Production & Maintenance Laborers Union, Local 383*, 533 F. 2d 481 (9th Cir. 1976); and *CF&I Steel Corp.* v. *United Mine Workers of America*, 507 F. 2d 170 (10th Cir. 1974)] relative to the permissible scope of injunctive relief, the imposition of which is occasioned by the conduct of a party of repeatedly violating the arbitration provision of a collective bargaining agreement; and it conflicts with decisions of this Court such as *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), and *May Dept. Stores* v. *NLRB*, 326 U.S. 376 (1945), relative to the scope of injunctive relief required by the conduct of the party to be enjoined;

(B) it conflicts with the decision of this Court in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), and the decisions of other Courts of Appeals [such as *Eazor Express, Inc.* v. *Int'l. Brotherhood of Teamsters*, 520 F. 2d 951 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); *Vulcan Materials Co.* v. *United Steelworkers of America*, 430 F. 2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971); and *Wagner Electric Corp.* v. *Local 1104, Int'l. Union of Electrical, Radio and Machine Workers*, 496 F. 2d 954 (8th Cir. 1974)] relative to the liability of a union under the agency test applicable to litigation which is jurisdictionally based on 29 U.S.C. § 185; and

(C) it decides an important question of federal law which has not been, but should be, settled by this Court, in the Sixth Circuit's application of this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), to a substantively dissimilar setting where previously articulated concepts of federal labor law, apparent in decisions of this Court, require imposition of injunctive relief to preserve the arbitration process and prevent illegal strikes in derogation of such a contractual commitment.

Should this Court fail to grant certiorari in this case and resolve the issues presented, the Sixth Circuit will have established three precedents, any one of which could have a decisive effect, adverse to established federal labor policy, on the future conduct of this litigation, on future cases concerning the enforcement of collective bargaining agreements, and in the area of labor-management relations.

A. The Sixth Circuit's Decision Conflicts With Decisions of This Court and Other Courts of Appeals in Unduly Restricting the Scope of Injunctive Relief to Enforce the Arbitration Provision of a Collective Bargaining Agreement.

By refusing the proper measure of injunctive relief mirroring the past conduct of the party to be enjoined, the Sixth Circuit has seriously eroded the remedial efficacy of injunctive relief as a general matter and disadvantaged a party who seeks

to implement the arbitration and the implied concomitant no-strike provisions of a collective bargaining agreement. Its decision conflicts with those of this Court as to the proper scope of injunctive relief as a remedial device generally and as to the utilization of such relief to promote the implementation of arbitration and implied no-strike agreements of collective bargaining contracts. In limiting the scope of available relief, this decision, contrary to the decisions of this Court and the expressions of at least three other Courts of Appeals, fosters industrial strife and additional litigation rather than the use of the contractual arbitration process.

In the general area of remedial considerations in federal court litigation, this Court has established that the permissible and proper parameters of injunctive relief coincide with the conduct of the party to be enjoined toward the end that one who has demonstrated a proclivity to a course of improper conduct should be restrained from committing future acts which would perpetuate such a pattern and practice of improper conduct. This Court has recognized that effective relief is denied a complaining party in such circumstances who is granted only that protection afforded by an order so narrow that it can be easily evaded by an imaginative adversary. *E.g.*, *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949); *May Dept. Stores* v. *NLRB*, 326 U.S. 376 (1945).

In the more specific area of labor-management litigation, this Court has judicially recognized and protected the federal policy of promoting the peaceful settlement of labor disputes through contractual arbitration processes in a consistent course of decisions, excepting the subsequently overruled *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Steelworkers Trilogy*, *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

The most significant aspect of this Court's protection of this important tenet of federal labor policy has been requiring adherence to prior express and implied promises made in a collective bargaining agreement through the remedial measure of injunctive relief. In reaching the conclusion that injunctive relief is a necessary device for enforcement of labor-management agreements and in the prevention of industrial strife, this Court considered and resolved several intermediate but fundamental issues centering largely on the apparent conflict between the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and the Labor-Management Relations Act, 29 U.S.C. § 185.

Initially, it was determined that the procedural requirements of Norris-LaGuardia do not apply to actions seeking to enforce arbitration since "the failure to arbitrate was not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." *Lincoln Mills*, 353 U.S. at 458. Later, this Court expressly capsulized the significant role of the federal judiciary in insuring the fulfillment of contractual promises to resolve disputes by arbitration as one not only to protect private interests involved in the collective bargaining process but also to vindicate the public good by avoiding labor strife:

> The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict.
>
> *Warrior & Gulf Navigation*, 363 U.S. at 584-85.

In further detailing the essential role of the federal courts in advancing the federal policy of avoiding the serious economic consequences of labor strife, this Court recognized the shift in congressional emphasis from protection of the "nascent labor movement" (evidenced by the Norris-LaGuardia Act) to appreciation of the relative parity in bargaining power

between labor and management resulting in a need for encouragement of arbitration as a means of peacefully resolving labor disputes (evidenced by 29 U.S.C. § 185). *Boys Markets*, 398 U.S. at 251. The net results of this recognition of the change in the realities of labor-management relations were the conclusion that injunctive relief was not only a desirable but a necessary tool of the federal courts for enforcement of the arbitration promises of labor agreements and that this type of injunction was excepted from the prohibitions of Norris-LaGuardia. *Id.* In *Gateway Coal, supra*, this Court concluded that, absent express language to the contrary, an agreement to arbitrate gives rise to a coterminous duty not to strike and that such an agreement is enforceable by means of an injunction. 414 U.S. at 377-78, 382, 387.

The subject decision of the Sixth Circuit threatens the vitality of this Court's prior decisions regarding the utilization of injunctive relief as a remedial measure generally and conflicts with prior decisions of this Court and the rationale of those of other Courts of Appeals [*Old Ben Coal, supra; Donovan Construction, supra; CF&I Steel, supra*] regarding its use specifically to protect and advance the contractual arbitration process as the substitute for industrial strife. The effect of the instant decision is to remove from a federal district court's remedial resources that scope of relief which is consistent with a party's past conduct of avoiding arbitration and attempting to inject the illegal pressure of a strike into the arbitration process and also necessary to insure fulfillment of promises to arbitrate. In constricting the prospective remedial aspects of injunctive relief, this decision forces an employee to repair to the federal court to obtain arbitration without the pressure of a strike *each time* a strike is substituted for arbitration as the method for resolving a different arbitrable dispute. Such a result fosters industrial strife and litigation rather than the utilization of the contractual arbitration process. It conflicts with the postulate of the decisions of this Court and those of other Courts of Appeals in this area.

B. The Decision of the Sixth Circuit is in Conflict With Decisions of This Court and Other Courts of Appeals in Failing to Properly Apply the Agency Principles Applicable to an Action Brought Under 29 U.S.C. § 185.

In excluding the application of ordinary agency principles properly pertinent to this action under 29 U.S.C. § 185 and imposing a significantly more restrictive test of union liability, the Sixth Circuit has rejected the plain language of § 185(e) as well as the determination of this Court, which is followed in other Circuits, as to the effect of that provision. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966); *Eazor Express, Inc.* v. *Int'l. Bhd. of Teamsters*, 520 F. 2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976); *Wagner Elec. Corp.* v. *Local 1104, Int'l. Union of Electrical, Radio and Machine Workers*, 496 F. 2d 954 (8th Cir. 1974); *Vulcan Materials Co.* v. *United Steelworkers of America*, 430 F. 2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971).

This Court, in considering the standard by which the liability of a union is to be judged in an action to which § 185(e) applied, has determined that ordinary agency principles govern with respect to union accountability for the conduct of its members. *Gibbs, supra.* This has been followed by several Courts of Appeals, resulting in the finding of union liability for the action of its membership at a particular job site in striking in violation of an arbitration provision, for the earlier failure to have undertaken efforts reasonably calculated to prevent future strikes in defiance of an arbitration obligation, and for the failure to undertake efforts reasonably calculated to end a present strike. *E.g., Eazor Express, Inc., supra; Wagner Electric Corp., supra; Vulcan Materials Co., supra.*

The present decision of the Sixth Circuit expressly rejects the application of certain agency principles; and by relying on cases such as *North American Coal Corp.* v. *Local Union 2262, United Mine Workers*, 497 F. 2d 459 (6th Cir. 1974),

it incorrectly applies a more restrictive standard for determining union liability and permits the International and its District No. 6 to avoid accountability for the action of its membership in striking over arbitrable matters at the Company's three mines. The decision of the Sixth Circuit further fails to require either the International or the District to undertake *any* effort to prevent recurrences of strikes or to end strikes even though both had knowledge of a pattern or practice of breaches of the arbitration obligation and even though both had the power to prevent such breaches through exercise of its supervisory powers over its members.

The Sixth Circuit's decision, if left uncorrected by this Court, will grant the International and District the benefits of being the exclusive bargaining representatives without the obligation to insure that those for whom they bargain carry out the duties arising from the collective bargaining agreement. This decision, if uncorrected, can only have a deleterious effect on the bargaining relationship between management and a union by undermining the precepts advanced in this Court's decisions beginning with *Textile Workers Union* v. *Lincoln Mills, supra.* These principles recognize the coequal positions of the parties to a collective bargaining agreement and require that each party bear the obligations imposed on it by the collective bargaining relationship. Finally, this decision, if uncorrected, promotes a disregard of the realities of union activity recognized by Congress in § 185(e) and by the Courts in decisions such as *Gibbs.*

Thus, this aspect of the Sixth Circuit's decision is in opposition to the determinations of this Court and in conflict with the decisions of other Courts of Appeals who have considered the issue. It should, therefore, be reviewed and reversed.

C. The Decision of the Sixth Circuit Extends the Decision of This Court in Buffalo Forge Co. v. United Steelworkers of America, to a Substantively Different Factual and Legal Setting, Thereby Deciding an Important Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court.

The Sixth Circuit's decision mechanistically applied this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976), to the significantly distinct circumstances of this case. In so doing, the Sixth Circuit decided an important question of federal law, by a sweeping extension of the scope of *Buffalo Forge* to strikes other than those in support of legal economic strikes and by unions having no substantive interest in the outcome of the generative disputes. That issue has not been, but should be, decided by this Court.

In its decision, the Sixth Circuit affirmed the District Court's determination that, on the basis of *Buffalo Forge Co.,* the previously issued preliminary injunctions could not be enforced against the striking members of the United Mine Workers employed at the Company's three mines, who had ceased work and refused to cross the picket lines of other members of the United Mine Workers employed at other mines – even though the picketing union members were then engaged in and seeking support for an illegal strike in defiance of the obligation to arbitrate embodied in the single collective bargaining agreement which covers both the picketers and the Company's employees. Such a simplistic application of *Buffalo Forge* overlooks the interests advanced in that decision which are defeated by its rote application to the facts of this case.

Buffalo Forge held improper an injunction against a strike in deference to a sister local union at the same job site which

was picketing the employer in support of its efforts to obtain a separate collective bargaining agreement of its own from the employer of both groups of workers. In that case, the underlying primary strike and picketing were found to be legal and protected activity. There was no issue, in the generative primary strike which could have been arbitrated. Thus, to refuse to enjoin the sympathy strike would not have a damaging effect on the arbitration process; and to enjoin the sympathy strike would seriously undercut the bargaining position of the primary collective bargaining strikers.

None of the factual or legal circumstances giving rise to the decision in *Buffalo Forge* are present in this case. The decision of the Sixth Circuit made new law which undercuts the arbitration process by countenancing a union's circumvention of its obligation to arbitrate and permitting the use of the strike process on a multi-employer basis in order to bring extra-contractual pressure to bear on the resolution of the primary dispute. The effective result of this decision is to judicially sanction the spread of an illegal strike and the anomalous situation where the initial strikers may be enjoined but the sympathy strikers may not.

The Sixth Circuit's decision failed to recognize the significant difference occasioned in situations such as this case by the presence of a single collective bargaining agreement, covering all workers in the industry. In the *Buffalo Forge* situation, the primary strikers have no underlying issue to submit to arbitration and, thus, refusing to enjoin the sympathy strike would have no adverse impact on the arbitration process. In this case, the issues prompting the illegal primary strike were capable of being arbitrated; also, under the single collective bargaining agreement governing picketers and sympathizers alike, settlement of the grievance in favor of the union could redound to the benefit of all union members no matter where employed.

Moreover, the Sixth Circuit's decision is contrary to this Court's decision in *Gateway Coal Co.* v. *United Mine Workers*,

supra, in failing to analytically compare the union's no-strike promise with its coterminous duty to arbitrate, and thereby failing to properly determine the permissible scope of injunctive relief in the context of the particular collective bargaining agreement in question. Rather than applying the *Gateway Coal* test of arbitrability (as refined from settled doctrine emanating from *Lincoln Mills* and the *Steelworkers Trilogy*), the Sixth Circuit borrowed its view of arbitrability from a dissenting opinion of Mr. Justice Black [*NLRB* v. *Rockaway News Co.*, 345 U.S. 71, 81 (1953)], in a case wherein this Court explicitly held that the right to refuse to cross a picket line can be bargained away. In holding that the question of the Company's employees' right to refuse to work in sympathy with other members of the United Mine Workers to be non-arbitrable, the Sixth Circuit repudiated the *Gateway Coal* criterion that the failure to exclude a dispute from arbitration affords a basis for concluding that the parties intended to arbitrate such a dispute. 414 U.S. at 377-78. That test of arbitrability has been reaffirmed most recently by this Court. *Nolde Bros., Inc.* v. *Local 358, Bakery & Confectionary Workers*, — U.S. —, 97 S.Ct. 1067, 1074 (1977). While the question of whether this right has been bargained away is for the arbitrator, the Sixth Circuit applied a standard, contrary to that approved by this Court, in concluding non-arbitrability of the issue and concomitant non-enjoinability of the defendants' strike activity in July and August, 1976.

The Sixth Circuit's decision, if left uncorrected, will have a debilitating effect on the doctrines contained in the decisions of this Court which promote the utilization of contractual arbitration processes in place of the industrial strife of unchecked strikes by unions in disregard of contractual obligations. The instant decision and its natural progeny provide a cloak of judicial immunity to persons who breach their own collective bargaining obligations in support of the disregard of the arbitration process by other union members whether such support is generated by a picket, a telephone call, a wink, or a nod. It will engender a resurrection of the use

of the weapons of collective bargaining for which the parties had contractually agreed to substitute the arbitration process to resolve labor disputes; and thus, it contravenes the federal labor policy, enunciated in the decisions of this Court, of fostering agreed upon arbitral processes in place of the weapon of the strike. Therefore, the Sixth Circuit's decision should be reviewed so that this Court can properly determine this critical aspect of federal labor law.

VII. CONCLUSION

The Sixth Circuit's decision in this case is contrary to decisions of this Court and those of other Courts of Appeals in regard to the scope of injunctive relief to remedy a determined pattern of illegal union conduct, the standards for adjudging union accountability for the actions of its members, and the availability of injunctive relief for violations of collecting bargaining agreements. The issues presented by this Petition are critical ones not only to this litigation and its future conduct but also to similar cases pending in other courts. It is respectfully submitted that the orderly development of the law in this area and the preservation of the heretofore developed federal labor policy of promotion of industrial peace require that the Sixth Circuit's departure therefrom be reviewed, that this Court's consideration of the issues presented not be deferred, and that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A. APRIL 23, 1975

MEMORANDUM AND ORDER OF DISTRICT COURT

(Filed April 23, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 75-234

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs, Ohio Power Company and its wholly owned subsidiary, Southern Ohio Coal Company (hereinafter "SOCCO") bring this action pursuant to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 seeking monetary and injunctive relief for defendants' work stoppage which is allegedly in violation of the National Bituminous Coal Wage Agreement of 1974. Defendants are the United Mine Workers of America (hereinafter "UMWA"), its District No. 6 and three locals of the UMWA, Local No. 1890, Local No. 1886 and Local No. 1957. The three locals represent, for collective bargaining purposes, the production and maintenance employees at Meigs Mine No. 1, Meigs Mine No. 2 and Raccoon Mine No. 3, respectively. This matter is now before the

Court on plaintiffs' request for a preliminary injunction ordering the defendants:

1. To refrain from committing, doing, uttering, writing or communicating any act, word, or deed, written, spoken or performed, which is intended, designed, or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of defendants to report for work or to work or cause or bring about a continuation of the work stoppage at Meigs Mine No. 1, Meigs Mine No. 2, and Raccoon Mine No. 3;

2. To refrain from continuing or reinstituting the work stoppage now existing at Meigs Mine No. 1, Meigs Mine No. 2, and Raccoon Mine No. 3;

3. To refrain from picketing or in any manner interfering with anyone seeking ingress to or egress from Meigs Mine No. 1, Meigs Mine No. 2 and Raccoon Mine No. 3;

4. To utilize the grievance and arbitration procedures of the National Bituminous Coal Wage Agreement of 1974 with respect to arbitrable grievances;

5. To take all action which may be necessary to assure compliance with the terms of the National Bituminous Coal Wage Agreement of 1974.

The Supreme Court in *Boys Market, Inc.* v. *Retail Clerks' Union Local 770*, 398 U.S. 235 (1970), held that a District Court, subject to the traditional principles of equity, has jurisdiction under § 301 to grant injunctive relief against a work stoppage on the part of a union if the collective bargaining agreement contains a mandatory arbitration procedure and the work stoppage is over a grievance or involves a matter which is subject to arbitration under the agreement. The Court stated:

> 'A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless

> and until it decides that the case is one in which an injunction would be appropriate despite the Norris-La-Guardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity – whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.' 370 U.S., at 228. (Emphasis in original.)

At a hearing held in this matter plaintiffs established that both parties are contractually bound by the National Bituminous Coal Wage Agreement of 1974. Article XXIII of this agreement requires the resolution of all disputes between the parties in accordance with its grievance and arbitration provisions. Further, plaintiffs established that the unions herein had failed to follow these procedures and had instead engaged in a work stoppage. Defendants, while conceding a work stoppage, contend that its members failed to cross picket lines set up by persons not employees of the mines in question for fear of violence. They further claim that none of the locals have any grievance or dispute with SOCCO. It is clear that plaintiffs are ready to arbitrate the question of the right of its employees to refuse to work because of the presence of pickets outside the mine gates or any other grievance the local unions might have which is prompting this work stoppage. It is equally clear that the unions have not initiated the grievance procedure nor have they taken any sanctions against their members in order to prohibit the work stoppages. The

testimony adduced regarding the unions' fear of unidentified persons picketing outside the mines is not sufficient in my opinion to warrant a breach of the bargaining contract. Regardless of the reasons for the work stoppages, the clear language of the collective bargaining agreement mandates that *all* disputes be resolved according to the machinery provided. Thus the work stoppage is in violation of the agreement, and, subject to traditional principles of equity, is within the *Boys Market* exception.

At the hearing held April 21, 1975, the Court was made aware of the fact that the unions had discontinued the work stoppages and had returned to work at all three mines at 12:01 a.m. April 21, 1975. Accordingly, the Court feels that the granting of an injunction herein would not be appropriate at this time. However, upon the showing, during the pendency of this action, that a similar work stoppage has been reinstituted and that irreparable harm will result, an Order for preliminary relief will issue forthwith.

/s/ ROBERT M. DUNCAN, Judge
United States District Court

APPENDIX B. JUNE 19, 1975

MEMORANDUM AND ORDER OF DISTRICT COURT

(Filed June 19, 1975)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 75-234

SOUTHERN OHIO COAL COMPANY,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants.

MEMORANDUM AND ORDER

On April 10, 1975,[1] plaintiffs, the Ohio Power Company and its wholly owned subsidiary, Southern Ohio Coal Company (hereinafter "SOCCO") brought this action pursuant to Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185, seeking monetary and injunctive relief for defendants' work stoppages which are allegedly in violation of the National Bituminous Coal Wage Agreement of 1974. Named as defendants were the United Mineworkers of America (hereinafter "UMWA"), its District No. 6, and

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[1] Unless otherwise specified all dates referred to are in 1975.

three locals of the UMWA, Local No. 1890, Local No. 1886, and Local No. 1957. Thereafter, a hearing was held on plaintiffs' motion for an order enjoining work stoppages then being engaged in by the three local unions. In declining to grant the injunction the Court found that plaintiffs had failed to present any proof that they were suffering irreparable harm. See the Memorandum and Order entered herein April 23, 1975. This matter is again before the Court on a motion by plaintiffs to enjoin temporarily further work stoppages. This motion is directed at Raccoon Mine No. 3, represented by Local No. 1957. Exhibits admitted in evidence at the first hearing was considered resubmitted for purposes of the second hearing.

Findings of Facts

SOCCO and the UMWA are both signatories to the National Bituminous Coal Wage agreement of 1974. Especially pertinent here is Article XXIII entitled "Settlement of Disputes." Section C of this Article provides as follows:

> Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

The section then goes on to describe a five-step procedure, culminating in arbitration, which was established for the purpose of resolving all disputes arising between the parties. Despite this binding arbitration provision, the evidence adduced at the hearing established that members of Local No. 1957 had engaged in work stoppages three (3) days in December; three (3) days in March, one (1) day in May; and one (1) day in June (as of the date of the hearing on June 11). The latter two stoppages, which were the immediate

cause for this hearing, are indicative of the actions engaged in by Local 1957.

The work stoppage of May 28 was occasioned by a dispute over the capability of a supervisor, John Allen. Mr. Don Brown, superintendent of Raccoon No. 3, testified that union members approached him on May 20, concerning the problem of a personality conflict between Mr. Allen and the ten-man crew working under him. He further testified that after talking with the union members, he agreed to make Mr. Allen a fireboss[2] for what he described as a "cooling off" period, during which time he would bring Allen and his crew together to discuss the problem. Mr. Cleland, the Chairman of the Safety Committee for Local No. 1957, testified that the dispute between Allen and his men also concerned their feeling that Allen did not take necessary safety precautions. He confirmed that it was agreed with Mr. Brown that Allen would be made a fireboss. No further problems arose with regard to Mr. Allen until May 27 when he was put in charge of three miners not in his original ten-man crew for the purpose of setting timbers to shore up some weak spots in the mine. Mr. Thomas, the shift foreman for Raccoon No. 3, who made the timber setting assignments, testified that he was under the impression Allen was prohibited from supervising only his original crew until the personality conflict between Allen and the men had been resolved. He also testified that because of the inexperience of the three miners assigned to the timber setting job, it was necessary to have an experienced miner in charge. According to Mr. Thomas, Allen was the only foreman available at that time, the others being off sick. Allen therefore was assigned as a supervisor for that one assignment and then returned to his job as a fireboss. Although no complaints were made by the union during the May 27th assignment, the miners did not report for work on May 28. The local union seeks to justify this action on the part of its members by

[2] A fireboss is one who checks for pockets of gas and other dangerous conditions which affect the safety of men working in a mine.

alleging that the company had itself violated the terms of the collective bargaining agreement. It contends that it had presented a grievance to Mr. Brown which grievance had been resolved by the agreement to suspend temporarily Mr. Allen as a supervisor. When the company subsequently put him in charge of three miners, defendant argues, it contravened the grievance resolution and gave the union the right to engage in a work stoppage.

The work stoppage of June 2 was occasioned by the local union's discontent over several incidents of shortages in various individual miners' pay checks. According to the testimony, the company's computerized pay system occasionally failed to be current on the job assignment and pay rate of a miner, resulting in his receiving a smaller pay check than he actually deserved. It was uncontroverted at the hearing that the company always paid the miner the difference when the pay shortage was brought to its attention. Rather than file a grievance over this matter, the union members did not report for work on June 2.

As noted above, the work stoppages were only the last in a series of stoppages over the past seven months since the collective bargaining agreement became effective on December 6, 1974. Each time, the miners have not filed a grievance but instead have simply caused the mine to be closed for a 24-hour period. Mr. William Hilton, general superintendent of mines for SOCCO, testified that when the mine is closed for a day approximately 2,000 tons of clean[3] coal production is lost and SOCCO is unable to meet its contractual commitments. Further, daily maintenance of the mine is lost, thereby occasioning some deterioration in the overall condition of Raccoon No. 3. Mr. Hilton also testified that the work force at Raccoon is a relatively inexperienced one, averaging less than one year of coal mining experience. The training of routine work and safety habits within the

[3] "Clean" coal is mined coal after it has been processed to separate rocks, dirt and other debris from it.

mine is continually being broken by the work stoppages, thereby affecting the efficiency of the miners and the mining operation. He stated he had sent telegrams to the representatives of UMWA, its District No. 6 and the local union requesting them to use their best efforts to return the men to work. Mr. Porter, the president of Local No. 1957, testified that he always contacts the District representative when his men do not report for work. Although Mr. Porter testified that a representative of the International Union keeps in close contact generally, he stated that he gave no notice of his union's walk-outs to the International representative. On the basis of these facts plaintiffs have sought to prove a series of work stoppages which amount to a pattern of union activity in contravention of the collective bargaining agreement and which has caused and will continue to cause irreparable harm to plaintiffs. They contend that in addition to the local union's direct involvement in the work stoppages, the UMWA and District No. 6 are also responsible for the stoppages because they failed to take any disciplinary action against Local No. 1957; they, therefore, condoned and supported the illegal stoppages.

Discussion

The beginning point for any consideration of injunctive relief in a case such as this is the Supreme Court's decision in *Boys Market, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970). There the Court delineated the standards for invoking this Court's equitable powers in an action such as this. It stated:

> A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both are contractually bound to arbitrate, the District Court may issue no

> injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance. (Emphasis in original.)

Boys Market, Inc. v. *Retail Clerks' Union Local 770, supra* at 228.

The defendants do not seriously contend, nor could they, that they are not contractually bound to arbitrate the grievances involved herein. Nor is there any dispute that the Coal Company has been and continues to be ready and willing to resolve the problems with the miners through the grievance procedure. Finally, this Court believes that the traditional principles of equity dictate that the request for preliminary relief be granted. SOCCO has amply demonstrated a pattern of activity by the local union which does in fact reflect disregard of the contractual provisions of the National Bituminous Coal Wage Agreement and which further shows a probability that the Local No. 1957 will continue such temporary walk-outs whenever they again become dissatisfied over some condition of work at the mine. The Court is not persuaded that Local No. 1957 was justified in staging the May 28th stoppage because the Company had violated a resolved grievance agreement. This Court will not determine whether the misunderstanding constituted a violation of the collective bargaining agreement. This is the very type of matter which the parties have bound themselves to resolve through the grievance procedure and thus is the very type of fact-finding a court should refuse to engage in.

The Court is persuaded that the plaintiffs are suffering irreparable harm by the disruptive work stoppages. The nature of some of the injuries suffered by plaintiffs are such that damages would be speculative and monetary relief would not serve to coompensate them adequately. Finally, in weighing the equities between the parties the Court feels that plaintiffs would suffer more from denial of relief than would the union from its granting. The primary benefit derived by SOCCO from the collective bargaining agreement is a stable work force, and this is lost when the union resorts to repetitious work stoppages. On the other hand, the local union is only being required to do what it has already contractually bound itself to do. The Court finds under these circumstances that injunctive relief is warranted against Local No. 1957. The Court, however, finds that this is not so with regard to UMWA and District No. 6. There is no evidence that the International Union had notice of these stoppages or in any way encouraged or condoned them. Thus, there was nothing which would or could trigger UMWA's disciplinary powers against Local No. 1957's activities. Although District No. 6 did receive notice, the Court contends that notice alone is not sufficient. There is no evidence that the District instigated, condoned or otherwise encouraged the work stoppages or that it had any methods or procedures by which it could discipline Local No. 1957 and thereby prevent the stoppages.

For the reasons set forth above, Local No. 1957, its officers, agents, members, employees and others associated with or acting in concert with such defendant is ordered hereby:

> To refrain from engaging in any further work stoppage at Raccoon No. 3;
>
> To refrain from committing, doing, uttering, writing, or communicating, any word, act, or deed, written, spoken or performed which is intended, designed or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of the defendant to report for work or to work at Raccoon No. 3;

To utilize the grievance and arbitration procedures of the National Bituminous Coal Wage Agreement of 1974; with respect to arbitrable grievances; and

To take all action which may be necessary to assure compliance with the terms of the National Bituminous Coal Wage Agreement of 1974.

Plaintiffs shall, pursuant to Rule 65, F. R. Civ. P., file a bond of One Thousand Dollars ($1,000.00).

/s/ ROBERT M. DUNCAN, Judge
United States District Court

APPENDIX C. AUGUST 14, 1975

ORDER OF DISTRICT COURT

(Filed August 14, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOUTHERN OHIO COAL COMPANY,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants.

Civil No. C-2-75-234

ORDER

This matter is before the Court on the motion by plaintiff for a preliminary injunction directed against defendants. Such preliminary injunction seeks to enjoin defendants from participating in unauthorized work stoppages.

This matter was presented to the Court by oral argument by both sides, by offers of proof by plaintiff, and by the offer to present evidence from available witnesses by both sides.

It was stipulated in open court that the defendants, members of Local Union 1886, United Mine Workers of America, commenced an unauthorized work stoppage at 12:01 a.m. on July 28, 1975 and terminated such unauthorized work stoppage at 12:01 a.m. on August 11, 1975.

In view of the foregoing it is the opinion of this Court that a preliminary injunction prospective in effect cannot issue in the absence of a pending arbitrable unauthorized work stoppage. According, plaintiff's motion for a preliminary injunction is hereby DENIED.

It is so ODRERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX D. SEPTEMBER 9, 1975

MEMORANDUM AND ORDER OF DISTRICT COURT

(Filed September 9, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants.

Civil No. C-2-75-234

MEMORANDUM AND ORDER

On April 10, 1975,[1] plaintiffs, the Ohio Power Company and its wholly owned subsidiary, Southern Ohio Coal Company (hereinafter "SOCCO"), brought this action pursuant to Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185, seeking monetary and injunctive relief for defendants' work stoppages which are allegedly in violation of the National Bituminous Coal Wage Agreement of 1974. Named as defendants were the United Mine Workers of America (hereinafter "UMWA"), its District No. 6, and three locals of the UMWA, Local No. 1890, Local No. 1886, and Local No. 1957. Thereafter, a hearing was held on plaintiffs' motion for an

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[1] Unless otherwise specified, all dates referred to are in 1975.

order enjoining work stoppages over contractually arbitrable matters at Meigs Mine No. 1, Meigs Mine No. 2, and Raccoon Mine No. 3. In declining to grant the injunction, the Court found that issuance of the preliminary injunction was not appropriate at that time after having been informed of the discontinuance of the work stoppages which existed at the time of the institution of the action. The Court stated further that upon demonstration of a recurrence of a similar work stoppage and proof of irreparable injury it would give further consideration to the granting of a preliminary injunction. See the Memorandum and Order entered herein April 23, 1975. Following this Order, plaintiffs, on May, 29, 1975, filed a motion requesting an Order enjoining work stoppages then being engaged in by defendants UMWA, its District No. 6, and one of its local unions, Local No. 1957. After a hearing on this motion, the Court granted the injunction as to Local No. 1957, but declined to enjoin UMWA, or its District No. 6. See, Memorandum and Order entered herein June 19, 1975. This matter is again before the Court on a motion by plaintiffs to enjoin temporarily further work stoppages. This motion is directed at defendants UMWA, its District No. 6, and its local union, Local No. 1890 and Local No. 1886. Exhibits admitted in evidence at the first and second hearing were considered resubmitted for purposes of the third hearing.

Findings of Facts

SOCCO and the UMWA are both signatories to the National Bituminous Coal Wage Agreement of 1974. Especially pertinent here is Article XXIII entitled "Settlement of Disputes." Section C of this Article provides as follows:

> Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

The section then goes on to describe a five-step procedure, culminating in arbitration, which was established for the purpose of resolving all disputes arising between the parties. Despite this binding arbitration provision, the evidence adduced at the hearing established that: members of Local No. 1890 had engaged in work stoppages for nine (9) work shifts[2] in December, 1974, eight (8) work shifts in January, three (3) work shifts in February, five (5) work shifts in March, nineteen (19) work shifts in April, and all work shifts since the commencement of the present work stoppage on August 19; members of Local 1886 engaged in work stoppages for two (2) work shifts in December, 1974, one (1) work shift in January, one (1) work shift in February, eleven (11) work shifts in March, seven (7) work shifts in April, one (1) work shift in June, thirty (30) work shifts beginning July 28 and ending August 11, and all work shifts since the commencement of the present work stoppage on August 21; members of Local 1957 engaged in work stoppages for eight (8) work shifts in December, 1974, seven (7) work shifts in March, nine (9) work shifts in April, three (3) work shifts in May, three (3) work shifts in June, and all work shifts since the commencement of the present work stoppage on August 19. The latter stoppages, which were the immediate cause for this hearing, are indicative of the actions engaged in by the three local unions.

The work stoppages were occasioned primarily by a dispute over the issuance of copies of a document entitled "Guidelines for Dealing with Mine Health and Safety Committee" by SOCCO to its supervisory personnel. Testimony was also presented showing that officers of Local 1957 claimed that the presence of stranger pickets on the evening of August 18 was a contributing factor in the work stoppages and that the appearance of masked pickets at Mine No. 2 and the shooting

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[2] Meigs Mine No. 1, Meigs Mine No. 2, and Raccoon Mine No. 3 have three scheduled work shifts per working day and five working days per week.

of a member of Local 1886 as he left the mine property on September 1, after completing a safety inspection of the mine, was a contributing factor to the continuation of the work stoppages. No grievance was filed regarding any of the issues involved in the work stoppages prior to the time the work stoppages began.

As noted above, the work stoppages were only the last in a series of stoppages over the past nine months since the collective bargaining agreement became effective on December 6, 1974. Each time, the miners have not filed a grievance but instead have simply caused the mine to be closed for a period of time. Mr. William Hylton, general superintendent of mines for SOCCO, testified that when Meigs Mine No. 1 alone is closed for a day approximately 2,000 tons of clean[3] coal production is lost; when Meigs Mine No. 2 alone is closed for a day approximately 5,000 tons of clean coal production is lost; and when Raccoon Mine No. 3 alone is closed for a day approximately 2,000 tons of clean coal production is lost. The closing of any one or more of the mines also makes it impossible for SOCCO to meet its contractual commitments. Further, daily maintenance of the mine is lost, thereby occasioning deterioration in the overall condition of each mine. Mr. Hylton alto testified that the work force at each mine is a relatively inexperienced one, averaging less than one year of coal mining experience. The training of routine work and safety habits within the mine is continually being broken by the work stoppages, thereby affecting the efficiency of the miners and the mining operation. He stated he had sent telegrams to the representatives of UMWA, its District No. 6 and the local unions requesting them to use their best efforts to return the men to work.

Mr. Paul Williams, superintendent of Meigs Mine No. 1, testified that during Local 1890's work stoppage in January,

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3 "Clean" coal is mined coal after it has been processed to separate rocks, dirt and other debris from it.

Mr. Donald Nunley, District 6 Executive Board member, discussed the work stoppage with him at the Mine complex.

Mr. James Stump, superintendent of Meigs Mine No. 2, testified that during the present work stoppage which commenced at Mine No. 2 on August 21, Mr. Nunley was again present and discussed the work stoppages and that Mr. Nunley attempted to have the dispute over the "Guidelines" resolved prior to the men returning to work. Mr. Stump further testified that Mr. David Shreve, District 6 safety coordinator, was present at the Meigs Mine complex during the present work stoppages and stated that no grievance would be filed over the "Guidelines" and that the issue would have to be settled in the courts.

Mr. Stump further testified that Mr. Karl Kafton, International Executive Board member, was present at the mine complex during work stoppages in March and July-August, and that Mr. Nunley and Mr. Kelly Martin, District 6 Executive Board member, were present at the mine complex during work stoppages in July. Mr. Stump also testified that he had sent telegrams during the July-August work stoppage to Arnold Miller, President of UMWA, Mr. Kafton, Mr. John Guzek, President, District 6, and Mr. Gene Oiler, President, Local 1886.

Mr. Don Brown, superintendent of Raccoon Mine No. 3, stated that during the present work stoppage, Mr. Nunley and Mr. Louis Newkirk, District 6 safety coordinator, were present at the Meigs Mine complex for a meeting during the most recent stoppages.

A copy of the UMWA constitution was admitted into evidence. This document establishes the International as the "supreme legislative, executive, and judicial authority" over all union members, Article III, § 2, and proscribes the violation of collective bargaining agreements, Article XII, §§ 5-8, with power to enforce this constitutional obligation being given to each union member, Article XV, § 1. District or local union autonomy may be suspended, *inter alia*, to assure performance or enforcement of a collective bargaining agreement,

Article XVIII, § 1, and proceedings to impose such a sanction may be initiated by any member. Article XVIII, § 2. And the International President may take control of a recalcitrant district or local. Article XVIII, § 7.

On the basis of these facts, plaintiffs have sought to prove a series of work stoppages which amount to a pattern of union activity in contravention of the collective bargaining agreement and which has caused and will continue to cause irreparable harm to plaintiffs. They contend that in addition to the local union's direct involvement in the work stoppages, the UMWA and District No. 6 are also responsible for the stoppages because they had notice of the work stoppages and failed to take any disciplinary action against their members; they, therefore, condoned and supported the work stoppages.

Discussion

The beginning point for any consideration of injunctive relief in a case such as this is the Supreme Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235 (1970). There the Court delineated the standards for invoking this Court's equitable powers in an action such as this. It stated:

> A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity — whether breaches are occurring and will continue, or have been threatened and will be committed; whether

> they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance. (Emphasis in original.)

Boys Markets, Inc. v. *Retail Clerks Union Local 770*, *supra* at 228.

The defendants do not seriously contend, nor could they, that they are not contractually bound to arbitrate the grievances involving the "Guidelines." Nor is there any dispute that the Coal Company has been and continues to be ready and willing to resolve the problems with the miners through the grievance procedure under the terms of the National Bituminous Coal Wage Agreement of 1974. Finally, this Court believes that the traditional principles of equity dictate that the request for preliminary relief be granted. SOCCO has amply demonstrated a pattern of activity by the local union which does, in fact, reflect disregard of the contractual provisions of the National Bituminous Coal Wage Agreement and which further shows a probability that the local unions will continue such work stoppages whenever they again become dissatisfied over some condition of work at the mine. The Court is not persuaded that the local unions were justified in staging the present work stoppage because of the defendants' claim that the Company had violated the Wage Agreement or because strangers were picketing the mine site. This is the very type of matter which the parties have bound themselves to resolve through the grievance procedure and, thus, is the very type of fact-finding a court should refuse to engage in. The Court does feel, however, that the members of the local unions were justified in refusing to cross a picket line composed of masked pickets and were justified in refusing to work for the three days following the shooting of a local union member by a masked picket at the Meigs No. 2 mine site.

The Court is persuaded that the plaintiffs are suffering irreparable harm by the disruptive work stoppages. The nature of some of the injuries suffered by plaintiffs are such that dam-

ages would be speculative and monetary relief would not serve to compensate them adequately. Finally, in weighing the equities between the parties the Court feels that plaintiffs would suffer more from denial of relief than would the union from its granting. The primary benefit derived by SOCCO from the collective bargaining agreement is a stable work force, and this is lost when the union resorts to repetitious work stoppages. On the other hand, the local union is only being required to do what it has already contractually bound itself to do. The Court finds, under these circumstances, that injunctive relief is warranted against Local No. 1890 and Local No. 1886. The Court, however, finds that this is not so with regard to UMWA and District No. 6. While there is evidence that the International had notice of the present and earlier work stoppages, there is no evidence that the International Union instigated or provoked the work stoppages. Further, while there is evidence that the District, through its officers, were aware of the present and earlier work stoppages, there is no evidence that the District instigated or provoked the current work stoppages.

For the reasons set forth above: (1) Local No. 1890, its officers, agents, members, employees and others associated with or acting in concert with such defendants are ordered hereby:

To refrain from engaging in any further work stoppages at Meigs Mine No. 1;

To refrain from committing, doing, uttering, writing, or communicating, any word, act, or deed, written, spoken or performed which is intended, designed or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of the defendants to report for work or to work at Meigs Mine No. 1;

To utilize the grievance and arbitration procedures of the National Bituminous Coal Wage Agreement of 1974, with respect to arbitrable grievances; and

To take all action which may be necessary to assure compliance with the terms of the National Bituminous Coal Wage Agreement of 1974.

(2) Local No. 1886, its officers, agents, members, employees and others associated with or acting in concert with such defendants are ordered hereby:

To refrain from engaging in any further work stoppages at Meigs Mine No. 2;

To refrain from committing, doing, uttering, writing, or communicating, any word, act, or deed, written, spoken or performed which is intended, designed or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of the defendants to report for work or to work at Meigs Mine No. 2;

To utilize the grievance and arbitration procedures of the National Bituminous Coal Wage Agreement of 1974, with respect to arbitrable grievances; and

To take all action which may be necessary to assure compliance with the terms of the National Bituminous Coal Wage Agreement of 1974.

Plaintiffs shall, pursuant to Rule 65, F. R. Civ. P., file a bond of One Thousand Dollars ($1,000.00).

/s/ ROBERT M. DUNCAN, Judge
United States District Court

APPENDIX E. AUGUST 4, 1976

ORDER OF DISTRICT COURT

(Filed August 4, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOUTHERN OHIO COAL COMPANY,
Plaintiff,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants.

Civil Action No. 75-234

ORDER

Plaintiffs Ohio Power Company and Southern Ohio Coal Company move the Court to order the defendant Locals 1886, 1890 and 1957 of the United Mine Workers of America, and their officers and members, to appear before this Court and show cause why they should not be held in contempt of the preliminary injunctive decrees issued in this case on June 19, 1975 (as to Local 1957) and September 9, 1975 (as to Locals 1890 and 1886). These decrees, entered after hearings, enjoined defendants from engaging in further work stoppages at their respective mines. Plaintiffs have submitted affidavits indicating that the members of the defendant locals have not reported regularly for work since on or about July 23, 1976. In their August 2, 1976 brief, at pages 4 and 5, plaintiffs indicate that a United Mine Workers of America Local in Kanawha County, West Virginia, has been engaged in an illegal work stoppage since on or about June 22, 1976, and that

> The strike has subsequently spread through the coal mining states of the eastern half of the country virtually paralyzing the coal industry. Defendants have joined in this strike, either in support of the West Virginia strikers . . . or in respect of their picket lines . . . , though on numerous occasions there have been no pickets at SOCCO'S mine sites and yet no union employees have worked. . . .

Whether the present work stoppage at plaintiffs' mines is termed a "sympathy strike" or simply a work stoppage in deference to the picket lines of sister unions, this Court, upon a review of the briefs submitted by the parties on this issue, is of the opinion the July 6, 1976 decision of the Supreme Court of the United States in *Buffalo Forge Co.* v. *United Steelworkers of Amerinca, AFL-CIO*, ——, U.S. ——, 44 U.S.L.W. 5346 (1976), is controlling. In that case, the Court held that a federal district court may not enjoin a sympathy strike pending an arbitrator's decision as to whether such a strike is prohibited by the applicable collective bargaining agreement. In the present case, as in *Buffalo Forge*, there appears to be no arbitrable grievance underlying the work stoppage. The only issue which the employer wishes to be submitted to an arbitrator concerns the legality per se under the contract of a sympathy strike. As the Supreme Court noted in *Buffalo Forge*, 44 U.S.L.W. at 5350 n. 10, absent a strike over an arbitrable grievance-type dispute, federal courts may not "enjoin a strike solely because it is claimed to be in breach of contract and because this claim is itself arbitrable."

Accordingly, *Buffalo Forge* casts a shadow upon the breadth of the injunctions issued June 19 and September 9, 1975, and at a minimum requires under the present circumstances the denial of plaintiffs' motions for orders to show cause.

Motions denied.

/s/ ROBERT M. DUNCAN
United States District Judge

APPENDIX F. FEBRUARY 11, 1977

OPINION OF COURT OF APPEALS

(Filed February 11, 1977)

Nos. 75-2392, 75-2393, 75-2394, 75-2395, 75-2396, 76-2031

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellees,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,
LOCAL UNION NO, 1957, ETC.,
Defendant-Appellant,

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants-Appellees.

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,
LOCAL UNION NO. 1890, ET AL.,
Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants-Appellees.

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellees,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,
LOCAL UNION NO, 1890, ET AL.,
Defendants-Appellants.

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,
LOCAL UNION NO. 1890, ET AL.,
Defendants-Appellees.

Decided and Filed February 11, 1977.

Before: PHILLIPS, Chief Circuit Judge, and WEICK, and CELEBREZZE, Circuit Judges.

CELEBREZZE, Circuit Judge. This case arose from a series of work stoppages at three coal mines owned by the Ohio Power Company and operated by the Southern Ohio Coal Company[1] – Meigs No. 1, Meigs No. 2 and Raccoon No. 3. The miners employed at these mines are members of Locals 1890, 1886, and 1957 of the United Mine Workers of America. The Southern Ohio Coal Company and the United Mine Workers are signatories of the Nationoal Bituminous Coal Wage Agreement of 1974. On April 14, 1975, the Company filed an amended complaint in the Southern District of Ohio seeking injunctive relief and damages for breach of the mandatory arbitration provision in the collective bargaining agreement.[2] Jurisdiction was based on § 301(a) of the National Labor Management Relations Act, 29 U.S.C. § 185(a) (1970). Named as defendants were Locals 1890, 1886 and 1957, District No. 6 and the United Mine Workers of America. The amended complaint alleged that the members of the unions were engaged in a continuing practice of striking over arbitrable grievances in violation of the no-strike pledge implied from the mandatory arbitration clause. The complaint also alleged that the strikes had been condoned and encouraged by District No. 6 and the United Mine Workers of America.

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[1] For the sake of clarity, we will refer to Appellants throughout the opinion as "The Company."

[2] Article XXIII, § (c) of the National Bituminous Coal Wage Agreement of 1974 provides as follows:

> Should differences arise between the Mine Workers and the Employer as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

The section goes on to describe a five-step procedure, culminating in arbitration, established for the purpose of resolving all disputes arising between the parties.

The District Court denied the initial motions for preliminary injunctions because the particular work stoppage had ceased, but the Court warned defendants that future work stoppages during the pendency of the action could result in injunctive relief for the employer. On May 28th, the employees at Raccoon No. 3, who are members of Local No. 1957, failed to report for work. The work stoppage was occasioned by the assignment of a supervisor to whom the miners objected. On June 2d, the members of Local No. 1957 again failed to report for work. This time the strike was set off by a computer error that shortchanged a number of miners' pay checks. On June 19th, the District Court granted a preliminary injunction against Local 1957 but refused to extend the order to the district and international unions. The Court found that the May 28th and June 2d work stoppages resulted from disputes over arbitrable grievances and thus violated the union's no-strike obligation. The Court also found that these work stoppages were only the latest of a series of strikes over arbitrable disputes where the miners failed to file grievances but simply close the mine for a short period. The Court noted that the Company was ready and willing to arbitrate the grievances. Finally, the Court concluded that the injunction was warranted by ordinary principles of equity because the Company was suffering irreparable injury from the repetitious work stoppages and would suffer more from the denial of the injunction than would the union from its granting. The District Court ordered Local 1957:

> To refrain from engaging in any further work stoppage at Raccoon No. 3;
>
> To refrain from committing, doing, uttering, writing, or communicating, any word, act, or deed, written, spoken or performed which is intended, designed or calculated to induce, persuade, order, cause or bring about the failure or refusal of any member of the defendant to report for work or to work at Raccoon No. 3;

To utilize the grievance and arbitration procedures of the National Bituminous Coal Wage, Agreement of 1974, with respect to arbitrable grievances; and

To take all action which may be necessary to assure compliance with the terms of the National Bituminous Coal Wage Agreement of 1974.

On August 19, 1975, mine workers at all three mines failed to report for their shifts. As a result the Company sought preliminary injunctions against Locals 1886 and 1890, District No. 6 and the UMW International.[3] The Court found that these work stoppages were primarily attributable to the Company's distribution of a document entitled "Guidelines for Dealing with Mine Health and Saefty Committee" to its supervisory personnel. The Court also indicated that the presence of stranger pickets at the mine sites and the shooting of a member of Local 1886 contributed to the August 18th work stoppage. As before, the Court noted that no grievances had been filed over the incidents and found that the work stoppages were over arbitrable issues and thus in violation of the implied no-strike agreement. The Court stated that the Company had "amply demonstrated a pattern of activity by the local union which does, in fact, reflect disregard of the contractual provisions of the National Bituminous Coal Wage Agreement and which further shows a probability that the local unions will continue such work stoppages whenever they again become dissatisfied over some conditions of work at the mine." Concluding that the equities supported issuance of preliminary injunctions against Locals 1886 and 1890, the District Court entered orders identical to the decree imposed on Local 1957. Once again, however, the Court refused to enjoin the district and international unions.

[3] Although work had also ceased at Racoon No. 3, Local 1957 was not made a party to the proceedings, presumably because of the injunction already in effect. Nor did the Company seek to have Local 1957 cited for contempt of the June 19th decree.

In late July of 1976, the mines were again closed. This time the shut down was caused by the miners' refusal to cross stranger picketlines set up at the mine sites by unidentified pickets. The Company viewed the miners' refusal to cross the picketlines as a violation of the outstanding injunctions, and motioned the Court for orders to show cause why the local unions should not be held in contempt. The District Court denied the motions feeling itself bound by the decision of the Supreme Court in *Buffalo Forge Co.* v. *United Steelworkers of America*, 44 U.S.L.W. 5346 (July 6, 1976), which had been decided in the interim since the injunctions were issued. The District Court reasoned that the miners' refusal to cross was protected activity and not subject to injunction. The Court concluded the order denying the motions with the statement that "*Buffalo Forge* casts a shadow upon the breadth of the injunctions issued June 19th and September 9, 1975, and at a minimum requires under the present circumstances the denial of Plaintiffs' motions for orders to show cause." The Company appeals from the Court's refusal to enjoin the district and international unions and from the denial of the motions for orders to show cause. The local unions challenge the issuance of the preliminary injunctions and contend, *inter alia*, that the orders are vague and overbroad.

A logical starting point for review of injunctions restraining work stoppages growing out of a labor dispute is the Supreme Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). In *Boys Markets* the Supreme Court overruled its previous decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), and held that, despite the prohibitory language of § 4(a) of the Norris-LaGuardia Act,[4] federal courts in the exercise of § 301 juris-

[4]

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to pro-

diction had the power to issue injunctions to restrain strikes over arbitrable disputes in violation of express or implied no-strike agreements. The *Boys Markets* Court adopted the standards suggested in the *Sinclair* dissenting opinion for the exercise of a court's equitable powers to enjoin a strike:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity – whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U. S., at 228. (Emphasis in original.)

398 U.S. at 254, *quoting Sinclair Refining Co.* v. *Atkinson*, 370 U.S. at 228 (Brennan, J., dissenting).

The unions claim that the preliminary injunctions were invalidly issued because the District Court failed to follow the *Boys Markets* formula. Specifically, they argue that the

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hibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1970).

work stoppages were caused by non-arbitrable disputes and that the District Court did not properly weigh the equities between the parties.[5] After reviewing the record, we affirm the findings of the District Court that the work stoppages which led to the preliminary injunctions centered around issues that the unions were contractually bound to arbitrate under the Bituminous Coal Wage Agreement of 1974. Nor can we conclude that the District Court abused its discretion in balancing the equities between the parties. The record does not support the locals' allegations of "bad faith" and "unclean hands" on the part of the Company. The District Court properly applied the *Boys Markets* guidelines and concluded that principles of equity supported issuance of the injunctions.

We also must reject the Company's contention that the District Court erred in refusing to extend the injunctions to District No. 6 and the UMW International. The District Court conceded that the District and International had notice of the work stoppages on August 13, 1975, and of earlier work stoppages, but held that mere notice was not sufficient to justify extending the injunctions to those parties. The Court found that neither the District or the International had instigated or provoked the current work stoppages. These findings are not clearly erroneous. The Company argues that this Court should follow ordinary principles of agency law and hold the District and International liable for the "mass action" of their members and for failing to use all "reasonable means" at their disposal to end the unauthorized strikes. While these agency theories have been met with favor by some courts, *see e.g.*, *Eazor Express, Inc.* v. *Intern'l Brotherhood of Teamsters*, 520 F. 2d 951 (3rd Cir. 1975), they have not been well received by this Court. As we recently reaffirmed in *Peabody Coal Co.* v. *Local Unions*, 543 F. 2d 10, 12 (6th Cir. 1976),

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[5] For discussion of the unions' allegation that the Court's failure to order the Company to arbitrate requires vacation of the injunctions see text at 28 *infra*.

there is no authority in this circuit for the proposition that a union may be held responsible for the "mass action" of its members in staging an unauthorized strike or for failure to use its "best efforts" in curtailing one. On the contrary, this Court has repeatedly held that a union may only be held responsible for the authorized or ratified actions of its officers and agents. *See e.g., North American Coal Corp.* v. *Local 2262, UMW*, 497 F. 2d 459, 466-67 (6th Cir. 1974). There may be occasions where a union's studied ambivalence toward an unauthorized strike may constitute sufficient inducement, encouragement and condonation of the strike to expose the union to injunctive relief and damages, *see Riverton Coal Co.* v. *United Mine Workers of America*, 453 F. 2d 1035, 1042 (6th Cir. 1972), this generally arises where there are facts on record to suggest that the union was allowing the wildcat strike to continue to bring pressure to bear on the employer and reap the benefits of the illegal work stoppage without outwardly violating its contractual commitments. Since the record does not disclose that the District and International encouraged, condoned or induced the strikes, either through action or inaction, those parties were properly excluded from the preliminary injunctions.

The Company claims that the District Court erred in declining to order the local unions to show cause why they should not be held in contempt for refusing to cross the stranger picketlines set up at the mine sites. Relying on the Supreme Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 44 U.S.L.W. 5346 (July 6, 1976), the District Court concluded that the locals' refusal to cross the picket lines was not enjoinable and therefore could not be the basis for contempt citations. Because we agree with the District Court that the matter is controlled by *Buffalo Forge*, we find no error in the denial of the motions for orders to show cause.

In *Buffalo Forge* the employer's plants were struck by "office clerical-technical" (O & T) employees who were in

the midst of collective bargaining negotiations. The production and maintenance (P & M) employees at the struck plants refused to cross the O & T picketlines. Both groups of employees were represented by the United Steelworkers of America. The P & M employees were working under contracts which provided for the arbitration of grievances, including disputes over the interpretation and application of the contract. The contracts also contained express no-strike clauses. The employer brought a § 301(a) action against the United Steelworkers and the locals representing the P & M employees alleging that the P & M work stoppage violated the no-strike agreement and that the question of whether the no-strike clauses had been violated was arbitrable under contractual procedures for settling disputes over the interpretation and application of each contract. The District Court denied injunctive relief, and the Second Circuit affirmed, holding that the P & M employees were engaged in a "sympathy strike" which was outside the narrow exception to the Norris-LaGuardia Act recognized in *Boys Markets*. The Supreme Court agreed with the result reached by the lower courts and held that it would be improper to enjoin the P & M employees' strike pending the arbitrator's decision on the scope of the no-strike clauses in the contracts. 44 U.S.L.W. 5346. The Court distinguished a sympathy strike from the typical *Boys Market* situation because refusal to cross another's picketline is not precipitated by an underlying dispute which the parties have agreed to submit to arbitration:

> *Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it were subject to the settlement procedures provided by the contract between the em-

> ployer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case. 44 U.S.L.W. at 5349-50.

Conceding that the issue of whether the sympathy strike violated the no-strike clause was arbitrable, the majority resisted the suggestion that district courts were empowered to enjoin alleged breaches of no-strike agreements despite the express prohibition of § 4(a) of the Norris-LaGuardia Act. The majority expressed the fear that acceptance of the employer's argument would involve federal courts in a wide range of arbitrable disputes and allow the judiciary to usurp the role of the arbitrator and interfere with the private contractual relationship of the parties:

> If an injunction could issue against the strike in this case, so in proper circumstances could a court enjoin any other alleged breach of contract pending the exhaustion of the applicable grievance and arbitration provisions even though the injunction would otherwise violate one of the express prohibitions of § 104. The court in such cases would be permitted, if the dispute was arbitrable, to hold hearings, make findings of fact, interpret the applicable provisions of the contract and issue injunctions so as to restore the status quo *ante* or to otherwise regulate the relationship of the parties pending exhaustion of the arbitration process. This would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes under the many existing and future collective-bargaining contracts, not just for

> the purpose of enforcing promises to arbitrate, which was the limit of *Boys Markets*, but for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator and of issuing injunctions that would otherwise be forbidden by the Norris-LaGuardia Act. 44 U.S.L.W. at 5350 (footnotes omitted).

The Company contends that there are significant differences between the work stoppages in this case and the "sympathy strike" in *Buffalo Forge*. It claims that the stranger pickets whose presence triggered the work stoppages were dissident West Virginia coal miners who are roving through the coal fields shutting down mines as an extension of an illegal strike begun at the Cedar Coal Company's mines in Kanawa County, West Virginia. Although the District Court did not expressly identify the stranger pickets, we are willing to assume for purposes of this opinion that the stranger picketlines were established by a roving band of mine workers engaged in an illegal strike at another mine. However, we do not accept the assumption proposed by the Company that the local unions by respecting the stranger picketlines somehow ratified the illegal West Virginia strike and adopted its goals as their own. The record does not support such a proposition. The Company attempts to distinguish the sympathy strike in *Buffalo Forge* from the refusal to cross in this case by contending that in *Buffalo Forge* the primary pickets and the sympathy strikers were members of different bargaining units, whereas in this case the stranger pickets and the local miners are all members of the same bargaining unit working under a single national contract. Thus, the employer reasons, the membership of the local unions stands to benefit from resolution of the primary strike favorable to the mineworkers. Just why this is so the Company does not elaborate. By claiming that the local miners have adopted the goals of the illegal strike, without being explicit as to their nature, the Com-

pany is asking this Court to conclude that this is not really a refusal-to-cross situation but a case where the locals have joined an illegal primary strike over arbitrable issues – a paradigm case for a *Boys Market* injunction. This we decline to do. The Bituminous Coal Wage Agreement provides that local disputes be grieved and arbitrated on a mine-by-mine basis.[6] The only benefit to be derived by the local unions from favorable settlement of the West Virginia strike is indirect, at best, and highly speculative. Accordingly, the bare assertion that all mine workers are members of the same bargaining unit and working under a national contract adds little to the central inquiry in *Boys Markets* cases – whether the employees sought to be enjoined are striking over issues which they have agreed to arbitrate. We cannot conclude on the present state of the record that the locals' refusal to cross the stranger picketlines amounted to ratification of and active participation in an illegal strike.[7]

Nor do we believe that the legality or illegality of the primary picketing is a valid basis for distinguishing *Buffalo Forge*. The company contends that a court must issue an injunction against a union which refuses to cross an illegal picketline or else it sanctions open support of illegal conduct. The Company claims it would be anomalous to regard a secondary strike as non-enjoinable when it is in support of a primary strike which is illegal, and hence enjoinable. The glaring defect in this argument is that it improperly shifts the focus of the court's inquiry from the employees against whom

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[6] National Bituminous Coal Wage Agreement, Act. XXIII, § (c). By appeal to the Arbitration Review Board, conflicting decisions of local arbitrators may be harmonized. However, we are not persuaded that the mere possibility of central review by the Board significantly strengthens the Company's argument.

[7] *Compare Food Fair Stores, Inc.* v. *Food Drivers Local 500*, 363 F. Supp. 1254, 1256 (E.D. Pa. 1973). *See* Abrams, *The Labor Injunction and the Refusal to Cross Another Union's Picket Line*, 26 CASE W. RES. L. REV. 178, 194 n. 87 (1975) (hereinafter Abrams).

the injunction is sought to the illegal pickets. Not only does this raise problems of proof because the initial strikers will often not be parties to the action, but it also places the burden of making complex judgments as to the legality of the primary line on the employees faced with the decision whether or not to cross. If they refuse to cross, they run the risk of injunction, damages and civil contempt. Both *Boys Markets* and *Buffalo Forge* teach quite explicitly that the proper focus of judicial attention in a § 301(a) injunctive action should be on the employees sought to be enjoined. The "narrow exception" to the Norris-LaGuardia Act perceived in *Boys Markets* may only be invoked where the union defending the action has struck "over a grievance which both parties are contractually bound to arbitrate." 398 U.S. at 254. As the Supreme Court reiterated in *Buffalo Forge*, "there is no general federal anti-strike policy". 44 U.S.L.W. at 5350, *citing Sinclair Refining Co.* v. *Atkinson*, 370 U.S. at 225 (Brennan, J., dissenting). It is only when an injunction is required to vindicate the contractual arbitration process that the anti-injunction policy of the Norris-LaGuardia Act will be accommodated to satisfy the public policy favoring peaceful settlement of labor disputes through arbitration. *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. at 253. The key to issuance of a *Boys Markets* injunction is a finding that the issue underlying the work stoppage is arbitrable. In this case however, the District Court found that there was "no arbitrable grievance underlying the work stoppage", but rather the work stoppage resulted from the miners' reluctance to cross the stranger picketlines. Thus, as in *Buffalo Forge*, whether motivated by sympathy or fear of reprisal, the work stoppage was not caused by an arbitrable dispute between the mine workers and the employer. The strike had "neither the purpose or the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain." *Buffalo Forge Co.* v. *United Steelworkers of America*, 44 U.S.L.W. at 5439. *Accord, U.S. Steel Corp.* v. *United Mine*

Workers, 418 F. Supp. 172, 174-75 (W.D. Pa. 1976) *aff'd* — F.2d — (3d Cir. Dec. 20, 1976). *See also Plain Dealer Publishing Co.* v. *Cleveland Typo. Union #53*, 520 F.2d 1220 (6th Cir. 1975).[8] The legality of the primary picketing is irrelevant. *See Island Creek Coal Co.* v. *United Mine Workers*, 507 F. 2d 650, 652 n. 3 (3d Cir. 1975). *Buffalo Forge* also requires us to reject the Company's contention that the arbitration clause in the collective bargaining agreement is broad enough to encompass the issue of whether the union had contracted away the employees' right to honor picketlines. The Bituminous Coal Wage Agreement of 1974 contains a broad arbitration provision which provides for arbitration of differences over the meaning and application of the contract and any "local trouble." Although the broad arbitration clause could, on its face, include the refusal to cross a picketline, the absence of an express no-strike clause in the contract is fatal to the Company's claim of arbitrability. In *Kellogg Co.* v. *NLRB*, 457 F. 2d 519, 525 (6th Cir. 1972), we stated that the employees' right to honor another's picketline may only be waived through "clear and unmistakable language." Justice Black in *NLRB* v. *Rockaway News Co.*, 345 U.S. 71, 81 (1953) (Black, J., dissenting), offered one explanation why waiver of the right to honor picketlines may not lightly be read into collective bargaining agreements:

> One way some union men help others is to refrain from crossing picket lines. Habitual respect for union picket lines has long been the practice of union men. This practice has been a prized asset of the unions. The Taft-Hartley Act was designed to regulate and restrict

[8] As the Court observed in the *Plain Dealer* opinion:

> [T]here is a clear difference between a labor dispute which results from a work stoppage and a work stoppage which is the result of a labor dispute arising from conditions of employment. . . . The latter is enjoinable. . . . [not] the former. . . .

520 F. 2d at 1227.

> the type of concerted activities in which employees could engage. But even that Act did not attempt to deprive unions of the advantage of a policy that required union men to respect picket lines.

The present Court apparently shares Justice Black's view since both the majority and dissenting justices in *Buffalo Forge* agreed that an implied no-strike agreement does not extend to sympathy strikes. The majority opinion remarked, "[t]o the extent that . . . courts . . . have assumed that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, they are wrong." 44 U.S.L.W. at 5350 n. 10. *Accord*, *id.* at 5355 n. 17 (dissenting opinion). The Bituminous Coal Wage Agreement of 1974 does not contain an express no-strike clause so the issue of the union's right to refuse to cross a picketline is not even arguably arbitrable. Since the unions' refusal to cross the stranger picketlines did not involve an arbitrable dispute between the employer and its employees, it is non-enjoinable, *see Buffalo Forge Co.* v. *Retail Clerks Union*, 44 U.S.L.W. at 5355 n. 20 (dissent), and therefore cannot provide a basis for contempt citations. *See United States Steel Corp.* v. *United Mine Workers of America*, 519 F. 2d 1236, 1249 (5th Cir. 1976).[9] We are not insensitive to the plight of the Company whose mines are shut down by reason of a labor dispute to which it isn't a party. However, unlike the employer in *Buffalo Forge*, the Company here does have recourse in the courts to reopen the mines. If the stranger pickets are there illegally, as it seems they are, the employer may resort to various legal

[9] One case supporting the Company's position is *Armco Steel Corp.* v. *United Mine Workers of America*, 505 F. 2d 1129 (4th Cir. 1974). In that case, the Fourth Circuit found that the district court had the power to enjoin the miners' refusal to cross stranger picketlines established by unidentified pickets. However, in *Buffalo Forge*, *Armco* was listed among the decisions which the Court said were at odds with the opinion which it affirmed. 44 U.S.L.W. at 5348 n. 9. The Court also expressly overruled the assumption made in *Armco* that a mandatory arbitration clause implies a duty not to engage in sympathy strikes. *Id.* at 5350 n. 10.

remedies directed at the illegal pickets.[10] After the stranger pickets are dispersed, the membership of the local unions will be free to return to work. We realize that this raises some practical difficulties for the employer, but the alternative is to hold the union to a bargain it never made and impermissibly interject the federal courts into the collective bargaining process.

We now turn to the final issues on appeal, the unions' contention that the preliminary injunctions are overbroad and vague.[11] Specifically, the unions charge that the injunctions amount to an outright ban on all work-stoppages during the life of the contract, without regard to the arbitrability of the underlying disputes. This, they claim, exceeds the "narrow exception" to the Norris-LaGuardia Act recognized in *Boys Markets* and violates § 9 of the Act which limits the scope of injunctions issued in cases involving labor disputes.[12] Finally, the unions submit that the decrees are

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[10] If the stranger pickets are engaged in a secondary boycott, the employer may pursue remedies before the National Labor Relations Board alleging violation of § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4) (1970). The Board is required to give expedited treatment to a secondary boycott charge and, if there is "reasonable cause to believe the charge is true," the Board must go to court and seek an injunction under § 10(1) of the Act. 29 U.S.C. § 160(1) (1970). If violence is threatened. § 7 of the Norris-LaGuardia Act permits injunctive relief to clean up the line. *See generally Abrams, supra* at 195 n. 92, 197 n. 104, 210 n. 158.

[11] Overbreadth and vagueness are distinct concepts:

> Analytically, the broadness of an injunction refers to the range of proscribed activity, while vagueness refers [to] the particularity with which the proscribed activity is described. Developments in the Law — Injunctions, 78 Harv.L.Rev. 994, 1064 (1965). "Vagueness" is a question of notice, i. e., procedural due process, and "broadness" is a matter of substantive law. *See* Wright & Miller, Federal Practice & Procedure 2953 at 546-47 (1973).

United States Steel Corp. v. *United Mine Workers of America*, 519 F. 2d 1236, 1246 n. 19 (5th Cir. 1975).

[12]

> [E]very restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

29 U.S.C. § 109 (1970).

impermissibly vague because they fail to conform to the requirement of Rule 65(d) that injunctions "be specific in terms" and "describe in detail and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). The Company denies that the Court's orders are vague and argues that an injunction need not be restricted to past acts specifically pleaded and proved where a union has shown a proclivity to strike over arbitrable grievances and the court has found that similar strikes are likely to recur. Thus, we are presented with the fundamental question of whether an injunction restraining a work stoppage may ever be prospective in effect and, if so, under what circumstances.

A number of circuit courts have addressed the question, but have failed to reach a consensus. In *Old Ben Coal Corp.* v. *Local No. 1487, UMW*, 500 F. 2d 950 (7th Cir. 1974), the Seventh Circuit upheld an injunction that permanently enjoined the union from striking over differences it was bound to arbitrate under the National Bituminous Coal Wage Agreement of 1971. The final decree incorporated the language of the arbitration clause. The district court had found that the union followed a policy of ignoring the contractual grievance and arbitration machinery in favor of wildcat strikes over arbitrable disputes. In upholding the injunction, the Seventh Circuit mentioned that a broad restraint on future strikes was the only adequate remedy to relieve the employer from irreparable injury caused by the numerous work stoppages. *Id.* at 953. The Seventh Circuit interpreted *Boys Markets* as permitting injunctions as broad as necessary to protect the arbitration process and declared that "the breadth of an injunction is to be determined by the extent of the misconduct." *Id.* The *Old Ben* Court also held that incorporation

of the contractual language cured the decree of vagueness. *Id.* In *C F & I Steel Corp.* v. *United Mine Workers of America*, 507 F. 2d 170 (10th Cir. 1974), the Tenth Circuit followed *Old Ben* and affirmed the grant of prospective injunctive relief. Unlike the *Old Ben* injunction, the order in *CF & I* was limited to specific areas of dispute which had led to work stoppages in the past. Finding nothing in *Boys Markets* inconsistent with equitable relief directed at future conduct and relying on the standards for judging the permissible breadth of injunctions announced in *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 436-37 (1941), and applied in *NLRB* v. *Local 282, Teamsters*, 428 F. 2d 994, 999 (2d Cir. 1970), the Tenth Circuit ruled that a prospective injunction may issue where a union has shown a proclivity to strike over arbitrable disputes.[13] Id. at 174-77. The Court dismissed the union's argument that the injunction violated § 9 of the Norris-LaGuardia Act because the union had adequate notice that the Company was seeking injunctive relief against future violations of the implied no-strike agreement. *Id.* at 176. In *Donovan Construction Co.* v. *Construction & Maintenance Laborers Union, Local 383*, 533 F. 2d 481, 484-86 (9th Cir. 1976), the Ninth Circuit announced its willingness to join the Seventh and Tenth Circuits in ordering prospective injunctive relief whenever a party "can adduce convincing evidence that the anticipated labor dispute is likely to occur, and that the harm threatened thereby is of such magnitude as to bring his situation within the *Boys Markets* guidelines."[14] *Id.* at 484.

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[13] The *CF&I* Court has been criticized for applying standards developed in public law cases to a § 301 action, which is essentially a private contracts suit. *See United States Steel Corp.* v. *United Mine Workers of America*, 519 F. 2d 1236, 1247 n. 21 (5th Cir. 1975); *United States Steel Corp.* v. *United Mine Workers of America*, 534 F. 2d 1063, 1076 (3d Cir. 1976).

[14] The Ninth Circuit vacated the injunction in *Donovan* as overbroad because of the insufficiency of factual support in the record for a prospective decree:

In *United States Steel Corp.* v. *United Mineworkers of America*, 519 F. 2d 1236 (5th Cir. 1975), the Fifth Circuit took the opposite position and indicated that prospective injunctive relief may never be granted in a § 301 action. Judge Wisdom, writing for the Court, held that the broad prospective injunction issued by the district court exceeded the limits of *Boys Markets* and thus violated the Norris-LaGuardia Act. *Id.* at 1245. Repeating the warning from *Boys Markets* that not every strike over an arbitrable dispute is enjoinable, Judge Wisdom expressed the belief that the guidelines set down in *Boys Markets* require case-by-case adjudication whenever an injunction is sought against a particular work stoppage. *Id.* He characterized the prospective injunction issued by the district court as "the very evil Norris-LaGuardia sought to remedy," and observed that the decree embodied the presumption that every strike during the life of the contract would violate the court's order and force the union to litigate the applicability of *Boys Markets* in contempt proceedings. *Id.* He also concluded that the injunction violated § 9 of the Norris-LaGuardia Act because the decree was not limited to specific acts referred to in the complaint. *Id.* at 1249. The lack of specificity in the terms of the injunction, according to Judge Wisdom, also rendered

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> We read this to mean that each restraint imposed by a *Boys' Markets* injunction must be grounded on a finding by the District Court that the activity restrained is a proper subject for injunctive relief despite the Norris-LaGuardia Act. If the scope of the injunction is so broad as to enjoin union activity in situations that the court *could not have found* to be suitable for *Boys Markets* relief, because of the paucity of factual support for the necessary findings, the injunction crosses the jurisdictional boundary of the Norris-LaGuardia Act. We believe the injunction here crossed that boundary.
>
> The record before us provides no evidence other than a single work stoppage that future strikes were likely, that they would cause irreparable harm, that there was no adequate remedy at law, or that the employer would suffer more from the denial of the injunction than would the union from its issuance.

533 F. 2d at 486 (emphasis in the original).

the injunction impermissibly vague in violation of Rule 65(d) despite the incorporation of language from the collective bargaining agreement in the order. *Id.* Thus, in the Fifth Circuit it appears that a prospective injunction may never issue in a case arising out of a labor dispute and an employer faced with a series of wildcat strikes must adjudicate each work stoppage on a case-by-case basis.

The Third Circuit became the most recent entry in the field with its decision in *United States Steel Corp.* v. *United Mine Workers of America*, 534 F. 2d 1063 (3d Cir. 1976). Precisely defining the position of the Third Circuit is complicated by the fact that each member of the panel filed a separate opinion. Judge Gibbons wrote the main opinion in which Judge Rosenn concurred with Chief Judge Seitz concurring in the result. Although the Court of Appeals reversed the trial court and vacated the injunction as vague and overbroad, Judge Gibbons, with Judge Rosenn concurring, stated that federal courts in § 301 actions had the power to enjoin prospectively "a pattern of contract violations." *Id.* at 1078. In reaching this conclusion, Judge Gibbons reviewed the precedents in other circuits and discussed at length Judge Wisdom's belief that *Boys Markets* required case-by-case adjudication and thus barred prospective relief:

> The power of a federal court to decide the meaning of a labor agreement in a § 301 suit is clear. Once it has been done so it should not be required to relitigate essentially the same issue in a slightly different context over and over again. If the plaintiff in a § 301 suit pleads and proves that the defendant, whether labor organization or employer, is engaging in a pattern of conduct which results in repeated and similar violations, nothing in § 9 of the Norris-LaGuardia Act, as we read it, prevents an injunction directed at such a course of conduct. The court that has once determined in an adversary proceeding the meaning of a contract must have the power to protect the parties and itself from the necessity for and burden of repeatedly adjudicating what

> often may be the identical issue. And while we agree with Judge Wisdom that the *Lincoln Mills-Boys Markets* exception to the Norris-LaGuardia Act requires ad hoc adjudication relating the violation to the contract, we do not agree that a remedial injunction may not encompass a pattern of ongoing activity. It is by no means clear that Judge Wisdom intended to suggest that injunctive relief is entirely unavailable against a chronic pattern of continuing mischief. If he did, however, we respectfully disagree.

Id. at 1077. He also commented on the factual findings a district court should make in determining the breadth of a prospective injunction:

> Prospective injunctive relief should go as far as, but no farther than, the pattern of violations suggests is necessary. Before prospective injunctive relief is ordered the district court must, we think, make specific findings based on evidence in the record as to the types of violations which have occurred in the past and limit injunctive relief to the likelihood of their recurrence, or to new and different kinds of violations which may be expected to occur in the future. *Id.*

Judges Gibbons and Rosenn parted ways, however, on the issue of whether an injunction may ever be phrased as broadly as the arbitration clause of the collective bargaining agreement Judge Gibbons expressed the fear that an overbroad injunction would unfairly tip the economic balance in favor of the employer:

> A blanket injunction in the language of the arbitration clause places in the hands of the successful § 301 plaintiff a weapon by which harassment by contempt citations may take the place of the normal ongoing collective bargaining process. No § 301 defendant should be subjected to that risk.

Id. at 1078 (footnote omitted). Judge Rosenn, on the other hand, would permit an injunction as broad as the arbitration clause whenever strikes in violation of the no-strike agreement are so widespread as to defy categorization. *Id.* at 1082-83. In summary, the circuit precedents on the permissible breadth of injunctive relief in § 301 actions are far from uniform. The Tenth, Ninth and Third Circuits would appear to sanction prospective injunctive relief against specifically identified contractual violations which have occurred in the past and are likely to recur in the future. The Seventh Circuit would permit an injunction as broad as the contractual arbitration clause, and the Fifth Circuit would seem to bar any injunctive relief against future strikes.

We prefer to take an intermediate position. We see nothing in *Boys Markets* that is inconsistent with a grant of prospective injunctive relief in the exercise of § 301 jurisdiction. Justice Brennan, the author of the *Boys Markets* decision, clearly envisioned the possibility of prospective relief in his *Sinclair* dissent:

> The complaint alleged that the union had, over the past several months, repeatedly engaged in "quickie" strikes over arbitrable grievances. Under the contract and the complaint, then, the District Court might conclude that there have occurred and will continue to occur breaches of contract of a type to which the principle of accommodation applies. It follows that rather than dismissing the complaint's request for an injunction, the Court should remand the case to the District Court with directions to consider whether to grant the relief sought—an injunction against future repetitions. This would entail a weighing of the employer's need for such an injunction against the harm that might be inflicted upon legitimate employee activity. It would call into question the feasibility of setting up *in futuro* contempt sanctions against the union (for striking) and against the employer (for refusing to arbitrate) in regard to prospective disputes which might fall more or less clearly into the adjudicated category of arbitrable grievances. In short, the District Court will have to consider with great care whether it is possible to draft a decree which would deal equitably with all the interests at stake.

Sinclair Refining Co. v. *Atkinson*, 370 U.S. at 228-29.

It cannot seriously be disputed that a series of wildcat strikes in derogation of a mandatory arbitration clause can severely cripple a mine's production rate causing the mine owner irreparable injury and leave the contractual arbitration machinery in shambles. In *Boys Markets* the Supreme Court described a union's no-strike obligation, express or implied, as the *quid pro quo* for the employer's undertaking to submit disputes to the arbitration process. 398 U.S. at 248. Wide-scale disregard of the union's no-strike obligation deprives the employer of the benefit of the bargain struck during the negotiations and threatens the underpinnings of the arbitration process. For this reason, federal courts are empowered by § 301(a) to specifically enforce arbitration agreements where one party is attempting to evade its contractual responsibility. As the *Boys Markets* majority observed:

> . . . the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate.

Id. at 249. An employer faced with the tactic of repeated strikes over arbitrable grievances need not repair to federal court each time his plant is shut down to relitigate issues decided in previous litigation. *See United States Steel Corp.*

v. *United Mine Workers of America*, 534 F. 2d at 1077. Once a court has found that a union is engaged in a continuing practice of striking over arbitrable disputes and the *Boys Markets* guidelines are satisfied, we believe that the ensuing injunction may be extended to encompass future strikes over disputes similar to those which caused strikes in the past. To unduly restrict the scope of injunctive relief deprives the employer of an "immediate, effective remedy" and defeats the national policy of fostering arbitration. We join those courts which have concluded that granting prospective injunctive relief in appropriate cases is consistent with the accomodation reached in *Boys Markets* between the policies of the Norris-LaGuardia Act and the public policy encouraging peaceful settlement of labor disputes through arbitration.

Our holding that prospective injunctive relief may be appropriate in § 301 actions should not be construed to reflect an insensitivity to the dangers posed by overbroad injunctions. We share Judge Wisdom's concern that the indiscriminate issuance of blanket injunctions by over-zealous courts could signal a return to the pre-Norris-LaGuardia era of ad hoc sweeping anti-strike decrees. Even though we believe that § 9 of the Norris-LaGuardia Act must be accommodated where necessary to conform to national labor policy, § 9 still requires a court to issue the narrowest possible injunction necessary to effectively safeguard the plaintiff's rights. *Cf. International Assoc. of Machinists* v. *Street*, 367 U.S. 740, 773 (1961). We need not decide here whether a court should ever issue an injunction as broad as the contractual arbitration clause.[15] We note however, that a court called on to supervise a blanket injunction runs a grave risk of becoming ensnarled in the private relationship of the parties and substituting its interpretation of the collective bargaining agreement for that of the arbitrator. A overbroad injunction presents the same

[15] *But see United States Steel Corp.* v. *United Mine Workers of America*, 534 F. 2d at 1081 n. 7, 1082-83 (Rosenn, J.).

risk of excessive judicial entanglement that led the Supreme Court in *Buffalo Forge* to reject the argument that the arbitrability of the scope of the no-strike clause was itself sufficient basis for a *Boys Market* injunction. The practical effect of an overbroad prospective injunction is to permit specific enforcement of the union's no-strike obligation through the contempt power, a result that *Buffalo Forge* may not countenance. Courts should be wary of introducing new weapons into the economic struggle between labor and mangament.[16] *See Pittsburgh Plate Glass Co.* v. *NLRB*, 427 F. 2d 936, 946 (6th Cir. 1970) *aff'd* 404 U.S. 157 (1971). An overbroad injunction inhibits the exercise of important employee rights and induces the employer to resort to the courts for contempt proceedings rather than to submit disputes to arbitration. Thus, an overbroad injunction sacrifices the national policy of avoiding interference in the private economic affairs of the parties without furthering the cause of arbitration. Therefore, prospective injunctions should only be granted in extreme cases where absolutely necessary to preserve the arbitration process agreed to by the parties. The decree must be narrowly drawn and firmly grounded on factual support in the record. Before an injunction may issue which grants prospective relief, the District Court should expressly find: that the present strike may be enjoined under *Boys Markets*;[17] that the union has engaged in a pattern of strikes over arbitrable grievances that is likely to continue; that the strikes constituting the pattern of violation would warrant relief under the *Boys Markets* formula; and, that the decree is limited to specifically identified areas of dispute which have already been adjudicated and which satisfy the *Boys Markets* guidelines.

[16] An injunction restraining a work stoppage may often settle the underlying labor dispute prematurely and permanently. *See Buffalo Forge Co.* v. *Retail Clerks Union*, 44 U.S.L.W. at 5351. For this reason, the injunctive remedy should be used sparingly. *See generally* Abrams, *supra* at 200, 205-06.

[17] *But see CF&L Steel Corp.* v. *United Mine Workers of America*, 507 F. 2d at 176.

Applying these standards, we are constrained to agree with the local unions that the preliminary injunctions issued in this case are overbroad and must be vacated. The injunctions amount to nothing less than a court order that the employees report to work daily during the pendency of the action. We also conclude that the factual findings made by the District Court cannot support the breadth of the injunction. To sustain a prospective injunction, a court must make detailed findings concerning the pattern of past work stoppages and the likelihood of their recurrence and relate those findings to the *Boys Markets* formula. Taking judicial notice that strikes have occurred in the past over arbitrable grievances is not sufficient. *See United States Steel* v. *United Mine Workers of America*, 534 F. 2d at 1077; *Donovan Construction Co.* v. *Construction, Production & Maintenance Laborers Union, Local* 383, 533 F. 2d at 486. To the extent that prior work stoppages were occasioned by the miners' refusal to cross picketlines set up at the mines, *Buffalo Forge* prevents their inclusion in the District Court's finding of an ongoing pattern of strikes subject to *Boys Markets* injunctions. We also conclude that the injunctions were impermissiblly vague in violation of Rule 65(d), and that this vagueness was not cured by reference to the contractual arbitration provision.[18] The orders restrained the local unions from "any further work stoppages" and thus, by implication, included work stoppages that the court would have no power to enjoin. Even if the decrees were limited to work stoppages over issues subject to the arbitration clause, the unions could only gauge their conduct by reference to the Bituminous Coal Wage Agreement of 1974, and then be forced to test their interpretation of that agreement through contempt proceedings. Rule 65 requires that injunctions be specific "so that those who must obey them will know what

[18] However, we find that the unions did receive ample notice from the amended complaint of the Company's intention to seek prospective relief and reject the contention to the contrary. See *CF&I Coal Co.* v. *United Mine Workers of America*, 507 F. 2d at 176.

the court intends to require and what it intends to forbid." *Longshoremen* v. *Marine Trade Assoc.*, 389 U.S. 64, 79 (1968). The orders issued in this case do not inform the parties exactly what it is that the Court expects of them. A better course would have been to include instructions informing the parties of specific steps they must take to prevent a recurrence of the illegal work stoppages.[19] *See United States Steel Corp.* v. *United Mine Workers of America*, 534 F. 2d at 1078. Finally, a decree granting prospective relief must include an order to the employer directing him to arbitrate all grievances within the scope of the injunction. *See Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. at 254. The parties have raised a number of other issues which we have considered and find to be without merit. For the reasons stated above, we vacate the injunctions granted by the District Court and remand for proceedings not inconsistent with this opinion.

[19] The District Court should also consider whether there are any viable alternatives to issuance of a prospective injunction. For instance, even where injunctive relief is not available courts may order arbitration of the underlying issues if the contract so provides. *See Buffalo Forge Co.* v. *United Steelworkers of America*, AFL-CIO, 44 U.S.L.W. at 5349. The Court, within the exercise of its equitable power, may also require expedition of the arbitration process where necessary to prevent "foot-dragging" in the submission of disputes to arbitration. *See generally* Abrams, *supra* at 186 n. 39, 197 n. 45, 211 n. 163.

APPENDIX G. FEBRUARY 11, 1977

JUDGMENT OF THE COURT OF APPEALS IN CASE NO. 75-2392

(Filed February 11, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2392

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,

LOCAL UNION NO. 1957, ETC.,
Defendant-Appellant.

Before: PHILLIPS, Chief Circuit Judge, and WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunctions of said

District Court in this cause be and the same are hereby vacated and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: March 15, 1977

A True Copy.

Attest:
/s/ DARLENE KOENIG
Deputy Clerk

APPENDIX H. FEBRUARY 11, 1977

JUDGMENT OF THE COURT OF APPEALS IN CASE NO. 75-2393

(Filed February 11, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2393

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Circuit Judge, and WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunctions of said District Court in this cause be and the same are hereby vacated and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: March 15, 1977

A True Copy.

Attest:
/s/ DARLENE KOENIG
Deputy Clerk

APPENDIX I. FEBRUARY 11, 1977

JUDGMENT OF THE COURT OF APPEALS IN CASE NO. 75-2394

(Filed February 11, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2394

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Circuit Judge, and WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunctions of said District Court in this cause be and the same are hereby vacated and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: March 15, 1977

A True Copy.

Attest:
/s/ DARLENE KOENIG
Deputy Clerk

APPENDIX J. FEBRUARY 11, 1977

JUDGMENT OF THE COURT OF APPEALS IN CASE NO. 75-2395

(Filed February 11, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2395

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Circuit Judge, and WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunctions of said District Court in this cause be and the same are hereby vacated and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: March 15, 1977

A True Copy.

Attest:
/s/ DARLENE KOENIG
Deputy Clerk

APPENDIX K. FEBRUARY 11, 1977

JUDGMENT OF THE COURT OF APPEALS IN CASE NO. 75-2396

(Filed February 11, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2396

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,

LOCAL UNION NO. 1890, ET AL.,
Defendants-Appellants.

Before: PHILLIPS, Chief Circuit Judge, and WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunctions of said District Court in this cause be and the same are hereby vacated and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: March 15, 1977

A True Copy.

Attest:
/s/ DARLENE KOENIG
Deputy Clerk

APPENDIX L. FEBRUARY 11, 1977

JUDGMENT OF THE COURT OF APPEALS IN CASE NO. 76-2031

(Filed February 11, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-2031

SOUTHERN OHIO COAL COMPANY, ET AL.,
Plaintiffs-Appellants,

v.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Defendants,

LOCAL UNION NO. 1890, ET AL.,
Defendants-Appellees.

Before: PHILLIPS, Chief Circuit Judge, and WEICK and CELEBREZZE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunction of said

District Court in this cause be and the same are hereby vacated and the cause remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: March 15, 1977

A True Copy.

Attest:

/s/ DARLENE KOENIG
Deputy Clerk

Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY
AND OHIO POWER COMPANY,
Petitioners,

vs.

UNITED MINE WORKERS OF AMERICA,
UNITED MINE WORKERS OF AMERICA,
DISTRICT No. 6,
AND UNITED MINE WORKERS OF AMERICA,
LOCAL Nos. 1890, 1886 AND 1957,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY
AND OHIO POWER COMPANY,
Petitioners,

vs.

UNITED MINE WORKERS OF AMERICA,

UNITED MINE WORKERS OF AMERICA,
DISTRICT No. 6,

AND UNITED MINE WORKERS OF AMERICA,
LOCAL Nos. 1890, 1886 AND 1957,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I. SUPPLEMENTAL STATEMENT OF THE CASE

On May 10, 1977, Petitioners, Southern Ohio Coal Company and Ohio Power Company, filed their Petition for a Writ of Certiorari to review the judgments and Opinion of the United States Court of Appeals for the Sixth Circuit entered in these proceedings on February 11, 1977.[1]

[1] The Opinion of the United States Court of Appeals for the Sixth Circuit has now been officially reported at 551 F. 2d 695 (6th Cir. 1977).

Respondents, United Mine Workers of America, United Mine Workers of America, District No. 6, and United Mine Workers of America, Local Nos. 1890, 1886, and 1957, filed their Brief in Opposition to Petition for Writ of Certiorari on or about June 13, 1977. Additionally, on or about June 6, 1977, the Bituminous Coal Operators' Association, Inc. filed a Motion for Leave to File Brief Amicus Curiae in this proceeding.

Since the time of these filings, the United States Court of Appeals for the Fourth Circuit has rendered a decision in three consolidated cases, *Cedar Coal Co.* v. *United Mine Workers*, Case Nos. 76-1785, 76-1793, and 76-1846 (4th Cir. July 6, 1977).[2] *Cedar Coal* conflicts with the subject decision of the United States Court of Appeals for the Sixth Circuit as to the meaning and application of this Court's Opinion in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), which issues have been presented to this Court by Petitioners in "Question C" of their Petition for Writ of Certiorari. [Petition for Writ of Certiorari, pp. 3, 13, 19-22].

II. SUPPLEMENTAL STATEMENT ON REASONS FOR GRANTING THE WRIT OF CERTIORARI

One of the "Questions Presented for Review" originally set forth by Petitioners in the Petition is:

> (C) Can a federal district court issue injunctive relief or enforce a previously issued injunction against a local union which is engaged in a strike at a particular work site by refusing to cross the picket line of fellow members of the same international union if the picket line is in support of an illegal strike over an issue which is arbitrable under the single collective bargaining agreement covering both the union members who are picketing and those who refuse to cross the picket line?
>
> [Petition for Writ of Certiorari, p. 3]

[2] The Opinion of the United States Court of Appeals for the Fourth Circuit has not yet been officially reported, but it appears in the Appendix to this Supplemental Brief.

It was noted at that time that one of the reasons for granting the Writ of Certiorari so that the Sixth Circuit's decision could be reviewed and reversed is that

> • • •
>
> (C) it decides an important question of federal law which has not been, but should be, settled by this Court, in the Sixth Circuit's application of this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), to a substantively dissimilar setting where previously articulated concepts of federal labor law, apparent in decisions of this Court, require imposition of injunctive relief to preserve the arbitration process and prevent illegal strikes in derogation of such a contractual commitment.
>
> Should this Court fail to grant certiorari in this case and resolve the issues presented, the Sixth Circuit will have established three precedents, any one of which could have a decisive effect, adverse to established federal labor policy, on the future conduct of this litigation, on future cases concerning the enforcement of collective bargaining agreements, and in the area of labor-management relations.
>
> [Petition for Writ of Certiorari, p. 13]

In response to the contentions of the Petition, Respondents argued that the Sixth Circuit had properly applied *Buffalo Forge* by totally disregarding whether the primary strike is over an arbitrable issue [Respondents' Brief, pp. 14-15] and in determining that the refusal to cross the

picket line of other members of the United Mine Workers of America "is not even *arguably* subject to the arbitration provisions of the 1974 Wage Agreement" [Respondents' Brief, pp. 16-17]. Respondents further argued that the Sixth Circuit's interpretation and application of ***Buffalo Forge*** was consistent with what was then the only other decison of a Court of Appeals on these same matters — *United States Steel Corp.* v. *United Mine Workers,* 548 F. 2d 67 (3d Cir. 1976). [Respondents' Brief, pp. 17-19].

However, since the time of the filing of the Petition and Respondents' Brief, the Fourth Circuit has rendered its decision in *Cedar Coal Corp.* v. *United Mine Workers,* — F. 2d — (4th Cir. July 6, 1977) [Appendix]. The holdings of *Cedar Coal* regarding the meaning and application of ***Buffalo Forge*** is in patent conflict with the decision of the Sixth Circuit in the instant case and that of the Third Circuit in *United States Steel.*

In conflict with both the Sixth and Third Circuits, *Cedar Coal* held that a refusal by a United Mine Workers' local to cross a picket line of a sister United Mine Workers' local is an arbitrable matter under what has been the consistent language of the grievance/arbitration provisions of the last several collective bargaining agreements which the United Mine Workers has negotiated with a substantial portion of the coal operators in the United States — including Southern Ohio Coal Company [Appendix, p. 40a]. Equally significant is the finding of the *Cedar Coal* Court, likewise contrary to the Sixth and Third Circuits, that ***Buffalo Forge*** did not prohibit the imposition of injunctive relief against a strike by a local union of the United Mine Workers of America in "sympathy" with a strike by a sister United Mine Workers' local over an issue which is arbitrable under the same collective bargaining agreement which is the subject of this proceeding and was

arbitrable under the virtually identical arbitration provisions of an earlier collective bargaining agreement which was the subject of *United States Steel, supra* [Appendix, pp. 38a-39a].

As a foundation for its decision regarding the meaning and application of ***Buffalo Forge,*** the *Cedar Coal* Court recognized and accepted several operative factors which the Petitioners have urged throughout the course of this proceeding — 1) the members of the various United Mine Workers' locals are members of the same bargaining unit; 2) all terms and conditions of employment of those members of the various United Mine Workers' locals are governed by the same collective bargaining agreement; and 3) included among the grounds contractually specified for appeal of an arbitrator's decision to the arbitration review board are that the decision involves a new question on a substantial contractual issue or that the decision of one panel arbitrator is in conflict with decisions of another arbitrator on the same panel or on the panel in another District of the United Mine Workers [Appendix, pp. 38a-39a].

Admittedly, the *Cedar Coal* Court did not fully assent to the nonapplicability of ***Buffalo Forge*** to all instances of strikes by one local in "sympathy" with the strike of another local of the same International union, over an issue which is arbitrable under the two locals' single collective bargaining agreement. It restricted its finding of nonapplicability to situations where the members of the two locals are employed by the same employer — albeit at different mines [Appendix, pp. 39a-40a]. However, the *Cedar Coal* Court did recognize and accept as a further operative factor — which directly rendered ***Buffalo Forge*** inapplicable — that a strike by one local of the United Mine Workers in "sympathy" with the strike of another local of the United Mine Workers, over a dispute which

is arbitrable under the two locals' single collective bargaining agreement, has the purpose and effect of coercing an employer to concede on the arbitrable issue apart from the arbitral process [Appendix, pp. 38a-39a].

Cedar Coal's only departure from adherence to Petitioners' analysis of the entirety of the error of the Sixth Circuit's decision, which supports Petitioners' present request that the Sixth Circuit's decision be reviewed, is the Fourth Circuit's failure to recognize that the coercion on an employer to concede an arbitrable issue is generated by the interest of one United Mine Workers' local in the resolution of another local's arbitrable dispute. The existence of this generative factor is demonstrated by both the promotion of consistency among resolution of similar disputes and the review of an "interpretation of a substantial contractual issue." These are provided for in the United Mine Workers' collective bargaining agreement itself.

Notwithstanding such lack of complete adherence to Petitioners' analysis, the *Cedar Coal* decision represents a conflict among Courts of Appeals (and within the Sixth Circuit itself inasmuch as one of its members was a member of the unanimous *Cedar Coal* panel) on significant elements regarding the interpretation and application of *Buffalo Forge* to the factual and legal setting present in the instant case. It also belies the accuracy of Respondents' allegations that a Writ of Certiorari to review the Sixth Circuit's decision is not warranted because of the clarity of meaning of *Buffalo Forge*, the claimed proper application of that decision by the Sixth Circuit in a fashion consistent with all courts which have considered the issue, and the asserted lack of importance of the issues presented for review.

III. CONCLUSION

In addition and supplemental to the considerations for granting the requested Writ of Certiorari originally discussed in the Petition, there now exists a clear conflict among the Courts of Appeals as to the applicability of this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America* and the availablity of injunctive relief for violations of collective bargaining agreements. This conflict further highlights the imperative need to have these issues resolved for purposes of this litigation and its conduct as well as that of similar cases pending in other courts. Therefore, Petitioners renew their submission that the orderly development of the law in this area and the preservation of the heretofore developed federal labor policy of promotion of industrial peace require that the Sixth Circuit's departure therefrom be reviewed, that this Court's consideration of the issues presented not be deferred, and that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN CEDAR COAL COMPANY v. UNITED MINE WORKERS, CASE NUMBERS 76-1785, 76-1793, AND 76-1846

(Filed July 6, 1977)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1785

CEDAR COAL COMPANY, a Corporation,
Appellant,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT No. 17, UNITED MINE WORKERS OF AMERICA; LOCAL UNION No. 1766, UNITED MINE WORKERS OF AMERICA; CHARLES R. BOLLINGER, individually, and as President of Local Union No. 1766, United Mine Workers of America; JULIAN R. MORRIS, individually, and as Chairman of the Denny Division Mine Committee; GILBERT HILL, individually, and as Chairman of the Grace No. 2 Mine Committee,
Appellees,

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
Amicus Curiae.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. K. K. Hall, District Judge.

No. 76-1793 (also Misc. No. 76-8239)

CEDAR COAL COMPANY, a Corporation,
Appellant,

vs.

UNITED MINE WORKERS OF AMERICA; DISTRICT No. 17, UNITED MINE WORKERS OF AMERICA; LOCAL UNION No. 1759, UNITED MINE WORKERS OF AMERICA; HAYES HOLSTEIN, individually, and as President of Local Union No. 1759, United Mine Workers of America; OKEY J. JOHNSON, HAROLD HAMRICK, individually, and as members of the Grace No. 3 Mine Committee; DAVID FORMS, individually, and as Chairman of the Grace No. 3 Mine Committee; UTAH CLENDENIN, JR., RONALD ROSCOE MULLINS, individually, and as members of the Coal Fork No. 1 Mine Committee; EDWARD V. MASSEY, individually, and as a member of the Coal Fork No. 2 Mine Committee; EMMETT G. ADKINS, individually, and as Chairman of the Coal Fork No. 2 Mine Committee; and THOMAS L. GIBSON, individually, and as a member of the Coal Fork No. 2 Mine Committee,
Appellees,

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
Amicus Curiae.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge.

No. 76-1846

SOUTHERN OHIO COAL COMPANY, a Corporation, and OHIO POWER COMPANY, a Corporation,
Appellants,

vs.

UNITED MINE WORKERS OF AMERICA, an unincorporated association; DISTRICT 31, UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; LOCAL 1949, UNITED MINE WORKERS OF AMERICA, an unincorporated labor association; LAWRENCE FLOYD, as president of District 31, United Mine Workers of America; RAY ASHCRAFT, as president of Local 1949, United Mine Workers of America; JOHN DeWITT, as vice-president of Local 1949, United Mine Workers of America; SYLVESTER SARTORIS, as recording secretary of Local 1949, United Mine Workers of America; KENNETH FISHER, as financial secretary of Local 1949, United Mine Workers of America; and WILLARD BAKER, as treasurer of Local 1949, United Mine Workers of America,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, District Judge.

Argued August 10, 1976 Decided July 6, 1977.

Before WIDENER, Circuit Judge, LIVELY, Circuit Judge,* and MacKENZIE, District Judge.**

---

* United States Circuit Judge for the Sixth Circuit, sitting by designation.

** United States District Judge for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

This appeal is a consolidation of three related cases. In all three, plaintiff coal companies sought damages and injunctive relief in the federal district courts against striking union locals. Relief was denied for various reasons and by various procedures. In each case the appellant is the coal company.

The facts of each case will first be discussed separately.

I

Case No. 76-1793 involves Cedar Coal Company (Cedar) and the United Mine Workers of America, Local Union No. 1759 (Local 1759). Cedar is a West Virginia Corporation engaged in the production, preparation, and shipment of bituminous coal. Local 1759 is a local union which represents the employees who work at five mines owned by Cedar: Grace No. 3, Ridgeroad No. 5, Coal Fork Nos. 1 and 2, and Slaughter's Creek No. 1. Cedar and Local 1759 are signatories to the National Bituminous Coal Wage Agreement of 1974 which contains specific arbitration procedures, and, in Article XXVII, the following clause:

> ARTICLE XXVII – MAINTAIN INTEGRITY OF CONTRACT AND RESORT TO COURTS
>
> The United Mine Workers of America and the employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts.

Prior to June 1976, a dispute arose at Grace No. 3 mine over the meaning of Subparagraph III, (a) (7) of the 1974 Agreement:

> "The Employer shall station a responsible employee on the surface to communicate at all times with the employees when they are at work underground."

The dispute was whether this provision required this job, the "responsible employee," be given to a member of the bargaining unit, and if so, whether the company was required to create a new bargaining unit job to be posted for job bidding under the collective bargaining agreement or whether the duty could be assigned as an additional duty to an employee holding an existing bargaining unit job. The parties submitted the dispute over the meaning of subparagraph (7) to arbitration. On June 3, 1976, the arbitrator decided the contract required Cedar to assign the job to a bargaining unit member, a decision vindicating the Union's position.

But perhaps because the arbitrator misunderstood the full scope of the dispute, he did not decide whether the provision required Cedar to create a new job and to post it for bidding by bargaining unit members. The dispute continued over this undecided issue and on June 22 employees at Grace No. 3 mine went on strike in support of their continuing demand that the company create and post a new job for bidding.

The District and Local Unions filed suit in the United States District Court on June 23, seeking injunctive relief to enforce the arbitrator's decision as they interpreted it,

that is, as requiring a new job classification and posting. The hearing on the TRO-preliminary injunction against Cedar was scheduled for June 23, but because of a continuing jury trial, the district judge rescheduled the hearing for the following morning. The employees of Grace No. 3 returned to work on June 23, but apparently dissatisfied with the postponement of their case in the district court, the Union continued striking the following morning, June 24, when employees at all of Cedar's mines, whose employees were members of Local 1759, struck, and Local 1759 decided not to pursue further its request for injunctive relief in the courts although a hearing had been set. The record in that case discloses that it is still pending.

On June 24, Cedar suspended, subject to discharge, two employees of Grace No. 3 mine who allegedly instigated and encouraged the strike by picketing. The employees filed a grievance over the suspensions and the parties submitted the matter to arbitration. The arbitrator, on July 1, upheld the suspension of the two Grace No. 3 mine employees for two weeks without pay, but rejected their discharge as too severe. A protest over the suspension of these employees and a demand that the suspension be rescinded became additional reasons for the strike, which continued unabated.

Between June 26 and July 10, the strike was interrupted by the miners' regularly scheduled vacation. During this time, the arbitrator rendered a written decision on the posting issue which had been decided and delivered orally July 1. On July 9, he announced in writing that Cedar could assign the communications task to a bargaining unit member as an ancillary duty and did not have to post a new job for bidding by bargaining unit members.

On July 12, the first work day after vacation, Grace No. 3 and Coal Fork mines did not return to work, resuming the strike. The Coal Fork mines returned to work on July 13, but all Cedar employees (including those at the Coal Fork Mines) represented by Local 1759 (and by Local 1766) resumed the strike on July 14 and remained continuously on strike to the time this appeal was heard.

On July 12, Cedar filed suit for injunctive relief and damages under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. Cedar alleged that the unions and employees followed a "pattern and practice of refusing to submit . . . disputes . . . to peaceful settlement through grievance and arbitration procedures," that this pattern would continue, and that the present strike was over the arbitrator's rulings both as to the discharged employees and as to the job posting of the communication job. At the same time, Cedar moved for a preliminary injunction and a temporary restraining order. The TRO issued on July 13, to expire ten days later, and the hearing on the preliminary injunction was set for July 21. The employees protested the company's action in obtaining the restraining order and disputed the company's right to resort to the courts to enforce the arbitrator's decisions and the arbitration and implied no-strike provisions of the collective bargaining agreement. They indicated to Cedar's personnel manager that these actions were additional reasons for striking at all of the company's mines.

Although copies of the TRO were posted and served upon the employees, the strike continued and spread to other mines. At a hearing on civil contempt before the district court on July 16, two individual employee defendants were found guilty of contempt and fined $50 each. The judge imposed on the union a $25,000 per day coercive civil contempt fine and a $50,000 compensatory fine.

On July 20, Local 1759 filed a motion to vacate the TRO, emphasizing the three points to its position:

1. It argued the dispute was not arbitrable under *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), because the strike, it said, since at least July 18, was to protest federal labor injunctions and was in response to pickets from other locals who prevented employees from returning to work by "asking 'all UMWA miners to strike to stop the injunctions.'" Therefore, it argued the district court lacked jurisdiction for an injunction under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15.

2. It argued that because of threats of violence and the likelihood of personal injury created by an abnormally dangerous condition at the mine, the employees' refusal to return to work was not a strike under section 502 of the Labor Management Relations Act, 29 U.S.C. § 143, and therefore not enjoinable under 29 U.S.C. § 185.

3. Because the strike was not authorized by the defendant labor unions, it was a "wildcat" strike, and the unions could not be held responsible for it.

On July 22, Cedar suspended another three members of Local 1759 for picketing their own operations. According to an affidavit by Cedar's personnel manager, those discharges have since been an additional cause of the strike. The grievances filed in response to those suspensions are now pending before the arbitrator.

July 22 was also the day scheduled for the hearing on Cedar's preliminary injunction. But the attorneys for both parties were not available because of court appearances related to other litigation over the strike. The district judge therefore continued the hearing to July 27, and extended the TRO until that day. But on July 23 the judge continued the hearing indefinitely without stating any reasons. On that day, according to an affidavit of the personnel manager of Cedar, Hayes Holstein, the President of Local 1759 called him to say that at a Local meeting, 1759 decided

to continue striking until four additional demands were met. These demands were:

1. That the UMWA receive justice equal with that given coal companies in the federal courts.

2. That the judges of the United States District Court for the Southern District of West Virginia be investigated to see whether they have been improperly influenced to side with coal operators against the UMWA.

3. That Cedar Coal Company dismiss and abandon all of its cases in federal courts, including all contempt actions, and further abandon and withdraw all contractual disciplinary action taken against any members of Local 1759, and

4. That all coal operators including Cedar pledge not to take any further legal or contractual actions against members of the UMWA for their actions relating to the strike.

Cedar applied for an injunction pending appeal under Rule 62 FRCP. The district court denied the motion, saying:

> ". . . [A]lthough plaintiff may be entitled to such on the basis of the allegations in the verified complaint and the affidavit attached to the motion, such an injunction would not serve to end the strike; but would be unenforceable, and might aggravate and prolong the strike by further antagonizing the miners engaged in the strike."

Cedar then applied for an injunction pending appeal to the writer of this opinion, acting as a single judge under FRAP 8 "in an exceptional case where reference to a panel would be impracticable due to the requirements of time", who granted an injunction ordering Local 1759 to refrain from striking over any dispute concerning the arbitrator's

decisions relating to the outside communication job or the discharge of the two employees.

Cedar now appeals the district court's continuance indefinitely of the hearing for a preliminary injunction, under 28 U.S.C. § 1292 (a) (1).

II

Case No. 76-1785 Concerns another local union of the United Mine Workers of America within District 17, Local 1766, whose members are employees of Cedar Coal Company and are signatory to the National Bituminous Coal Wage Agreement of 1974. Members of Local 1766 work at Cedar's Denny Surface and Grace No. 2 mines.

On June 24 and 25, members of Local 1766 encountered pickets at the mouth of Slaughter's Creek Hollow, the main entrance to mines under the jurisdiction of Local 1766. Local 1766 employees did not cross the picket lines and did not report to work on those days. According to the Union, the pickets told members of Local 1766 that they were striking in protest of federal court injunctions in labor disputes. It is admitted that these initial pickets were from Local 1759.

After the regular annual vacation from June 26 to July 10, members of Local 1766 returned to work for two days. On July 14, pickets again appeared at the beginning of the work shifts. Local 1766 members did not report for work that day and have remained out up to the time of the argument of this case.

On July 20, Cedar filed suit against Local 1766, and the district and international unions, under 29 U.S.C. § 185. The complaint included allegations that the miners had for a long time followed a pattern and practice of refusing to submit arbitrable disputes to peaceful settlement through the arbitration procedures, and of engaging repeatedly in

work stoppages instead. It also alleged a pattern and practice of the defendants to treat arbitrable disputes arising at any mine of any signatory operator as their own, as disputes between all employees and all signatory operators, and as directly involving the terms and conditions of employment of all employees at all mines. This strike, the complaint alleged, was over the arbitrator's rulings in the disputes of Local 1759.

Although a district judge of the court, as before recited, had entered a TRO restraining Local 1759 "and all persons acting in concert and participation with it, from continuing to engage in the strike," Local 1766 did not return to work. As a result, all of Cedar's mines served by Locals 1759 and 1766 were shut down and rendered idle.

Filed with Cedar's complaint against Local 1766 was a motion for a TRO. On July 20, the district judge denied the motion, giving three reasons:

1. Since the dispute originally arose between Cedar and Local 1759, it was not 1766's dispute even though they might profit from its resolution. As far as 1766 was concerned, it was, instead, a sympathy strike.

2. "I understand from Buffalo Forge, when they said that the *Armco* case was plainly wrong, or whatever the words were, it was my understanding that that meant that whether or not to cross a picket line was not an arbitrable issue and therefore they couldn't be compelled to cross a picket line," and

3. Whatever its original cause, the strike developed into protest over real or imagined wrongs by the federal courts.

After the court announced that it intended to rule against Cedar on the motion for a TRO, counsel for Local 1766 moved the court to dismiss the complaint for failure to state a claim upon which relief could be granted. The

court granted the motion and dismissed the complaint, not just as against Local 1766 but as against all defendants.

Cedar immediately moved for an injunction pending appeal, which was denied, and then applied to the writer again, sitting as a single judge under FRAP 8, who denied the application, saying the outcome of the appeal in view of the recent Supreme Court case of *Buffalo Forge Co.* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976), was not certain enough to warrant an injunction pending appeal.

Cedar, in case No. 76-1785, appeals the dismissal of its complaint for failure to state a claim upon which relief could be granted.

III

Case No. 76-1846 involves employees of Southern Ohio Coal Company (Southern), a coal mining corporation in Marion County, West Virginia. Local 1949 is the labor organization representing Southern's production and maintenance employees working at the Martinka Mine. Southern is a signatory to the National Bituminous Coal Wage Agreement of 1974 with the UMWA, of which defendants District 31 and Local 1949 are members.

A work stoppage at the Martinka mine began at 12:01 a.m., Monday, July 26, when employees met, at the access road to the mine, twelve to fifteen pickets who were passing out handbills reading as follows:

"UMWA STRIKE AGAINST INJUNCTIONS

"UMWA LOCAL UNION 1759, CEDAR COAL COMPANY HAS A FEDERAL INJUNCTION AGAINST THEM. THEY ARE BEING FINED $50,000 and $25,000 A DAY FOR STRIKING.

"WE ARE SICK AND TIRED OF THE FEDERAL COURTS TAKING THE SIDE OF THE COAL OPERATORS. HUNDREDS OF LOCALS ALL THROUGHOUT THE COAL FIELDS KNOW HOW UNJUST THE USE OF FEDERAL INJUNCTIONS ARE.

"ALL UMWA MINERS ARE ASKED TO STRIKE TO STOP THE INJUNCTIONS AND TO END ALL FINES AND SENTENCES.

"Paid for by UMWA members, Combined Miners,
Robert Nelson, Chairman"

Some of these pickets were drinking and some appeared to be drunk. The district court found the pickets were not members of Local 1949, but were UMWA members. In its oral opinion the court stated that the Southern employees "perhaps from fear or perhaps from exercise of a right not to cross picket lines, or perhaps for other reasons, respectful of the picket line and its meaning to them, . . . did not cross it either at the midnight shift or at the 8:00 a.m. [shift]." It went on to find that the resulting work stoppage was "one of failure to cross a picket line maintained by others than the members of this particular local union."

On July 26, Southern filed a suit against District 31 and Local 1949 in the district court under 29 U.S.C. § 185, asking for damages and injunctive relief. The complaint alleged that the work stoppage was the result of refusal to cross a picket line, and took the position that this was a dispute resolvable under the arbitration provisions of Article XXIII of the collective bargaining agreement. The complaint further alleged that defendants refused to submit the matter to arbitration, and that they "engaged in a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures," resorting instead to work stoppages, a conclusion based on

fifteen other work stoppages by this local and district under the 1974 contract. There was nothing to indicate, the complaint continued, that such past pattern would not continue. But, after evidence was taken, plaintiffs' counsel conceded that there had been no refusal to arbitrate. Just as importantly, although given the opportunity, the union did not agree to arbitrate without concurrently striking, although arbitration was demanded.

Motions for a preliminary injunction and TRO accompanied the complaint. At a hearing on both,[1] the district court took testimony and then denied the motions, relying on *Buffalo Forge* v. *United Steelworkers of America, AFL-CIO*, 428 U.S. 397 (1976). Southern then appealed from the denial of injunctive relief and applied for an injunction pending appeal. As with Locals 1759 and 1766, Local 1949 had remained on strike until the argument of those cases with this one.

After the case was argued on the issue of an injunction pending appeal, we inquired of the parties if the issue of the denial of a preliminary injunction should be decided now, rather than deferring the matter, and they graciously agreed and filed additional authorities, all recognizing that that issue had to follow regardless of the outcome of a ruling on the injunction pending appeal.

IV

We may not close our eyes to the fact freely argued by the parties that the strike which commenced with the grievance of Local 1759 spread to affect at least a substantial part of the bituminous coal industry. It has since ceased and we have received additional briefs on mootness.

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[1] The district judge adopted a commendable procedure. He heard both motions together and heard oral evidence.

V

In case No. 76-1785 concerning Local No. 1776, et al, the unions take the position that the order dismissing the complaint is not an appealable order under 28 USC § 1291.

The full text of the order is as follows:

> "On motion of the defendants under Rule 12 (b) (6) of the Federal Rules of Civil Procedure, it is hereby ordered that plaintiff's complaint be, and it hereby is, dismissed with prejudice for failure to state a claim upon which relief can be granted.
> "Enter: This 20 day of July, 1976."

The gist of the unions' argument is that, because the order dismisses the complaint, rather than adjudicates, and might leave room open for later amendment, it is not an appealable order within the contemplation of § 1291. We do not agree. Not only does the transcript indicate that the order was intended to be in all respects final, we think an order dismissing a complaint with prejudice for failure to state a claim upon which relief can be granted, with no mention of amendment, and no attempt at amendment shown in the record, is a final appealable order under § 1291.

VI

In case No. 76-1793 concerning Local No. 1759, et al, the unions contend that the indefinite continuance of the motion for a preliminary injunction is not a denial of injunctive relief and thus is not an appealable order under 28 USC § 1292 (a) (1).

It must be remembered that the temporary restraining order issued by the court was to expire on July 23rd and that the hearing on the preliminary injunction had been set for July 22nd but was not heard on motion of

the unions because the attorneys for both sides were not available due to court appearances related to other litigation concerning the strike. On that account, the court had continued the hearing on the preliminary injunction to July 27th and had extended the TRO until the 27th. But on July 23rd the judge continued the hearing on the preliminary injunction indefinitely, that is to say "until the further order of . . . [the] court," stating no reason, and the matter has never been heard, although it was bound to have been brought to his attention by the application for an injunction pending appeal which was asked for in that court. So the failure to hear the motion for the preliminary injunction cannot be taken as inadvertence; rather, it may only be construed as a conscious denial of a hearing on the motion for a preliminary injunction and a similarly conscious allowing of the expiration of the TRO.

We hasten to add that by use of the word "conscious," we attribute no improper motive to the district judge, rather using the word to distinguish between acts which are voluntary on the one hand and inadvertent on the other.

We think the indefinite continuance amounted to the refusing of an injunction and is appealable as such under 28 USC § 1292 (a). In indistinguishable circumstances, the Fifth Circuit has held such action appealable in *United States* v. *Lynd*, 301 F2d 318 (5th Cir. 1962), and noted the holding with approval in *Kennedy* v. *Lynd*, 306 F2d 222, 229, n. 3 (5th Cir. 1962). See also *McCoy* v. *Louisiana, etc.*, 332 F2d 915 (5th Cir. 1964). We follow those precedents. See also Wright and Miller, *Federal Practice and Procedure*, Vol. 11, § 2962. Were an appeal not allowed under the facts as they are presented to us in this case, it would permit a plain denial of even the bare

consideration of whether to consider injunctive relief to go unaccounted for by virtue of an indefinite continuance. We are aware, of course, that the mere expiration of the TRO gives no ground for appeal. See Wright and Miller, supra.

Since we treat the district court's action as the refusal of a preliminary injunction, the question before us is whether the refusal was an abuse of discretion.

VII

The next defense the unions assert to these cases is that they are moot so far as the injunctive aspects of them are concerned. It is not contended that the damages question in case No. 76-1785 (Local 1766) is moot.

Their principal argument is that the mootness issue is controlled by *Oil Workers Local 8-6* v. *Missouri*, 361 U.S. 363 (1960), which followed *Harris* v. *Battle*, 348 U.S. 803 (1954).

In our case, the strike ended after the argument of the case and the day before a hearing for Local 1759 on a civil contempt citation before this court.

We think the cases are not moot, it being remembered that the questions before us in No. 76-1793 (Local 1759) and No. 76-1846 (Local 1949) are the denials of preliminary injunctions, while the question before us in No. 76-1785 (Local 1766) is the denial of any relief, temporary restraining order, preliminary or permanent injunction, or damages.

We begin with the proposition that mootness is a jurisdictional question going to the existence of a case or controversy under Article III of the Constitution. The rule is stated in *North Carolina* v. *Rice*, 404 U.S. 244 (1971), that courts are not empowered to decide moot questions or abstract propositions, but the exercise of judicial power

depends upon the existence of a case or controversy. The suit must be definite and concrete, touching the legal relations of parties having adverse legal interests and be a real and substantial controversy admitting of specific relief through a decree of conclusive character as distinguished from an opinion of what the law would be upon a hypothetical statement of facts.

Neither side would take exception, we think, to the just stated proposition. The unions, however, claim that under *Oil Workers* these cases are required to be moot because the strike has ended. In that case, the State of Missouri seized, under a Missouri statute, a public utility which had been the subject of a strike by the union. After the seizure, the State procured an injunction against the strike in a State court, and the strike terminated a day later. A month after that, a new collective bargaining agreement was signed, and two months later, the governor ended the seizure. During the course of the litigation, the injunction had expired by its own terms. The court held the case moot, stating that a judgment at that late date would be wholly ineffectual for want of a subject matter on which to operate, and an affirmance would ostensibly require something to be done which had already taken place, while a reversal would ostensibly avoid an event which had already passed beyond recall.

The *Oil Workers'* opinion did not discuss *Southern Pacific Terminal* v. *ICC*, 219 U.S. 498 (1911), stating that the application of that case to a similar fact situation had been rejected in *Harris* v. *Battle*, 348 U.S. 803 (1954). *Oil Workers* differs from our case in that there a new collective bargaining agreement was signed which had removed the cause for the strike. Here, the same collective bargaining agreement is present. In *Oil Workers*, the court said that adjudicating the merits would be an adjudication of a cause which no longer exists. In our case, as we show, the controversy is very much alive.

Oil Workers, however, was followed by *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963), which involved the validity of the same Missouri statute at issue in *Oil Workers*. In *Bus Employees*, the governor had seized a bus company under the same statute utilized in *Oil Workers*. After the filing of the jurisdictional statement in the Supreme Court, the governor, however, terminated the seizure order, leaving the labor dispute unresolved. The Court held the case was not moot and distinguished *Oil Workers* because in *Oil Workers* the underlying dispute had been settled and a new collective bargaining agreement had been executed. The Court added that there existed in *Bus Employees* not merely the speculative possibility of the invocation of the statute in some future labor dispute, but the presence of an existing unresolved dispute which continued subject to all the provisions of the statute involved. The report does not indicate whether or not the strike which had previously been enjoined by a State court in Missouri started up again after the executive order of the governor dissolving the seizure order.

In arriving at our conclusion, we have kept in mind the anti-injunction policy of the Norris LaGuardia Act and that we should avoid the at-largeness which brought it on. See *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195, 215, 219 (1962) (Mr. Justice Brennan dissenting). We have also been mindful of the often repeated admonition that we should not lend ourselves to becoming potential participants in a wide range of arbitrable disputes under existing and future collective bargaining agreements for the purpose of preliminarily dealing with the merits of the factual and legal issues that are subjects for the arbitrator. See *Buffalo Forge Co.* v. *United Steel-*

workers of America, AFL-CIO, 428 U.S. 397 (1976). As stated in *Buffalo Forge*, p. 409, there is no general federal anti-strike policy, and the Supreme Court has never indicated that the courts may enjoin actual or threatened contract violations despite the Norris LaGuardia Act, which of course is subject to *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235 (1970).

The mootness doctrine is nothing new, and years ago, in *Southern Pacific Terminal*, the Court held a controversy not moot which was capable of repetition, yet evading review. In that case, the Interstate Commerce Commission had issued an order to cease granting one Young an undue rate preference for a period of not less than two years. The period as extended had expired prior to the hearing of the case by the Supreme Court. The Court recited the mootness rule as that when "pending an appeal something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed." p. 514. It stated that in such cases the acts sought to be enjoined had been completely executed and there was nothing that the judgment of the court could have effected. A part of the reasoning was that the ICC usually operated by continuing orders and that it ought not to be able to defeat, by short term orders issued from time to time, the judicial construction of its orders which affected both the government and a carrier. The Court also mentioned the rights of the public which the government had endeavored to procure by the judgment of a court. Following *Southern Pacific Terminal*, numerous cases have considered the "capable of repetition, yet evading review," rule. The ones which immediately concern us are *Sosna* v. *Iowa*, 419 U.S. 393 (1975), and *Weinstein* v. *Bradford*, 423

U.S. 147 (1975). *Sosna* did not involve a labor union, rather holding not moot a claim contesting the validity of an Iowa divorce residency statute where a class of plaintiffs had been certified although the named plaintiff had completed her residency and, indeed, been divorced elsewhere. The significance of *Sosna* to this opinion is that it is construed in *Weinstein* v. *Bradford* (a prisoner's rights case) in the context of application of the capable of repetition, yet evading review doctrine. The doctrine is there construed as limited to a situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The second part of that standard is not substantially different from the one applied by us only shortly before in *Linkenhoker* v. *Weinberger*, 529 F2d 51, 52-53 (4th Cir. 1975).

The complaint in case No. 76-1785 (Local 1766) charges that the unions have for a long time past followed a pattern and practice of refusing to submit arbitrable disputes or differences to peaceful settlement through the grievance and arbitration procedures provided by said contracts and have repeatedly engaged in strike and work stoppages with an object to forcing and requiring Cedar and other signatory operators to settle such disputes and differences in accordance with the demands of the unions and in violation of said contracts. It also charges that since the effective date of the collective bargaining agreement the unions had repeatedly threatened and engaged in strikes and work stoppages with an object to forcing and requiring Cedar and other signatory operators to settle differences and disputes which are required to be settled under the terms of the collective bargaining agreement by

the grievance and arbitration procedure in accordance with the demands of the unions. The complaint also charges that there is, and has been for many years, a pattern and practice of the unions to treat and consider arbitrable disputes and differences arising at any and all mines of signatory operators covered by the collective bargaining agreement as their own, and to adopt as their own and as matters directly involving their own self-interest any and all disputes and differences arising at any mine of any operator signatory to said collective bargaining agreement, to engage in strikes and work stoppages in connection therewith in derogation of the collective bargaining agreement grievance procedures in order to coerce the operators into interpreting, applying, and administering the terms and provisions of the collective bargaining agreement favorably to the unions. The complaint further charged that the unions engaged in a strike over and in protest of the arbitrator's rulings with respect to the job posting dispute and consequent discharges which we remember took place in the mines served by Local 1759, the sister union of Local 1766.

The complaint alleges irreparable injury and damages and prays for injunctive relief to halt the strike, to require the present dispute to be submitted to arbitration, to require future arbitrable disputes to be submitted to arbitration, and for damages.

The complaint in case No. 76-1793 (Local 1759) alleges that the unions had for a long time past followed a practice of refusing to submit local or district disputes or differences at plaintiff's mines or related facilities to peaceful settlement through the grievance and arbitration procedures provided by the collective bargaining agreement but had repeatedly engaged in strikes and work stoppages with an object to forcing and requiring plaintiff to settle such

disputes and differences in accordance with the demands of the unions. It is alleged they continue such pattern and practice. The complaint then alleges the disputes over the outside communications job and the discharge of the two employees, with the resulting arbitrator's awards and the resulting strike over the awards.

The complaint alleges that Cedar has been and now is ready, willing, and able to submit to arbitration any and all matters giving rise to the dispute and work stoppage. It alleges irreparable injury and prays for injunctive relief to halt the strike, to submit the present disputes to arbitration, to submit future arbitrable disputes to arbitration, and for damages.

In case No. 76-1846 (the Southern Ohio and Local 1949 case), the verified complaint was in two counts. The first count alleged a work stoppage as a result of the refusal to cross the picket line previously described, the members of which picket line being later found by the district court to be members of the UMWA but not of Local 1949. It alleged that Southern Ohio was ready, willing, and able to arbitrate the dispute of whether or not the Local 1949 members had to cross the picket line, irreparable injury, and damages.

The second count repeated the allegations of the first count and added that there was a likelihood that the unions might repeatedly and willfully engage in work stoppages in specific disregard of the collective bargaining agreement's provisions in that under the existing 1974 agreement there had been a total of 15 work stoppages or strikes previous to the existing strike, which had resulted in the loss of in excess of 5,000 man days of work. The complaint alleged a willful and deliberate pattern of refusing and avoiding compliance with the arbitration procedures of the collective bargaining agreement, and resorting instead

to the economic pressure of strike and work stoppages for the purpose of coercing accession to demands of the unions which were subject to the arbitration procedures of the collective bargaining agreement. It alleged that Southern Ohio was and had been ready, willing, and able to arbitrate the disputes but that the unions had refused so to do. The complaint charged that the continuing resort to strikes rather than to arbitration would likely continue into the future.

The complaint, as to the first count, prayed for injunctive relief to stop the strike, to submit the dispute to arbitration, and to take such further action as might be necessary to comply with the collective bargaining agreement. As to the second count, the complaint prayed for injunctive relief to stop the strike, to submit present and future arbitrable disputes to arbitration, and to take action necessary to assure compliance with the terms of the collective bargaining agreement. Damages were asked for under the first count.

In ascertaining whether these cases are moot, because the complaint was dismissed in No. 76-1785 (local 1796), the allegations of the complaint must be taken as true. *Kossick* v. *United Fruit Growers*, 365 U.S. 731, 732 (1961). We think the same principle must apply in case No. 76-1793 (Local 1759), where the district court, by its indefinite continuance, denied injunctive relief without a hearing which deprived Cedar of any chance to present facts other than those alleged in the complaint as surely as if the case had been dismissed. A similar principle, albeit somewhat different, should apply in case No. 76-1846 (Local 1949). In the case concerning Local 1949, a hearing was held, so we should consider both the allegations of the verified complaint and the facts shown at the

hearing should they be different from the complaint in any essential element, which they are not.

It is, of course, admitted by all that the strike ended during the pendency of this appeal and only a short while after the argument of the cases. It is therefore apparent that the first element of the test in *Weinstein* was met, that is to say, the challenged actions in each case were in their duration too short to be fully litigated prior to their cessation or expiration. The challenged action of each of the unions is its strike which ended prior to the time it was fully litigated.

In case No. 76-1785 (Local 1766), Cedar has alleged that the unions have followed a pattern and practice of refusing to submit arbitrable disputes or differences to peaceful settlement through the grievance and arbitration procedures provided by the collective bargaining agreement, and that they have repeatedly engaged in strikes and work stoppages with an object to forcing and requiring Cedar to settle such disputes in accordance with the demands of the unions rather than through arbitration as required by the collective bargaining agreement. Cedar also charges a pattern and practice of treating and considering arbitrable disputes and differences arising at other mines of signatory operators covered by the collective bargaining agreement as their own and adopting the same as matters involving their own self interest, and to that end engaging in strikes and work stoppages in connection with such disputes in violation of the collective bargaining agreement grievance procedures.

In case No. 76-1793 (Local 1759), Cedar has alleged that the unions had for a long time past followed a practice of refusing to submit local disputes and differences to settlement through the grievance and arbitration procedures provided by the collective bargaining agreement and that

they had repeatedly engaged in strikes and work stoppages with an object to forcing and requiring Cedar to settle such disputes and differences in accordance with the demands of the unions rather than through the grievance procedures provided by the collective bargaining agreement. Cedar alleges they continue such pattern and practice and that the strike under consideration is an example.

In case No. 76-1846 (Local 1949), Southern Ohio alleges a willful and deliberate pattern of refusing and avoiding compliance with the arbitration and grievance procedures and instead a resort to the economic pressure of strikes and work stoppages for the purpose of coercing accession by Southern to demands of the unions instead of subjecting the disputes to the arbitration procedures of the collective bargaining agreement. It alleges that the unions not only have failed and refused to subject the present dispute, which it says is arbitrable, to the grievance procedure of the collective bargaining agreement, but that the unions have, under the present agreement, engaged in 15 strikes over arbitrable issues instead of arbitrating them, and it alleges this pattern is likely to continue.

Cedar invites us to consider its affidavits filed with its applications for injunctions pending appeal in the ascertainment of whether or not these cases are moot. We think they may be considered in ascertaining whether the cases are moot, although they should not be considered in ascertaining the merits. This is so because there was no mootness question before the district court, so we are not reviewing that. Rather, we are deciding whether the cases are now moot, and just as the end of the strike during the pendency of the appeal is a fact which we should consider in deciding the mootness question, we should also consider other undisputed relevant facts. As we have stated, mootness as we consider it here arises when "something occurs"

"pending an appeal." *Southern Pacific Terminal*, p. 514. One affidavit filed by Cedar with respect to Locals 1759 and 1766 shows that there have been 15 strikes by Cedar employees and local unions under the 1974 agreement over arbitrable issues; that 7 of those strikes were engaged in by employees at mines other than the mine at which the dispute causing the strike arose, as well as by the employees at the mine where the dispute arose. The other affidavit shows there have been 26 strikes by Cedar employees and local unions under the 1974 agreement, 12 of which were engaged in by employees at more than one of the company's mines, and all of the 12 strikes were engaged in by employees in both Locals 1759 and 1766. While these affidavits may seem, on their face, to possibly be somewhat inconsistent, they are not necessarily so, which further points out the difficulty caused by the district courts' failures to grant hearings in either of these proceedings. These facts in all events are essentially undisputed by the unions as they may relate to our examination of the mootness question.

We think the allegations of a pattern and practice of strikes over arbitrable issues instead of resorting to the grievance procedures of the contract, coupled with the allegations in these three cases, of repeated specific instances of striking over such issues rather than arbitrating, are facts sufficient to show that there was a reasonable expectation that the same complaining parties (Cedar and Southern Ohio) would be subjected to the same action again, and thus that the second condition of the doctrine as set out in *Weinstein* has been complied with.

In this context, we note that in at least two cases the Supreme Court has noted, in cases involving labor relations and strikes, that a factor to be considered is that ". . . authorizing the issuance of a temporary injunction as is

frequently true of a temporary injunction in labor disputes, may effectively dispose of . . . [litigants] rights and render entirely illusory his right to review . . . [in the Supreme Court] as well as his right to a hearing before the Labor Board." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 308 (1964). That principle was alluded to in *Liner* in holding a case not moot in an appeal by a union. The same principle was relied on in *Super Tire Engineering Company* v. *McCorkle*, 416 U.S. 115 (1974), and especially as that case was construed in *Weinstein*, p. 148. The principle quoted from *Super Tire* in *Weinstein*, at p. 148, is that " 'the great majority of economic strikes do not last long enough for a complete judicial review of the controversies they encounter,' " see *Super Tire*, 125-126.

The unions next argue that even if the issue is one properly framed as capable of repetition, yet evading review, that the cases only allow this view of mootness when a governmental interest is involved. See *Super Tire*, p. 122. We think this position is a too narrow view of the mootness doctrine. As a matter of principle, we doubt that a court is any less obliged to do justice between man and man than between citizen and sovereign. It is true that in the cases involving governmental entities, there will ordinarily be a policy, statute, or regulation which, unless not revoked or repealed, will continue to exist and which may indeed make more likely a repetition of the event which brought on the controversy in question. *Super Tire* phrases it as a brooding presence. But the Supreme Court, in *Carpenters Union* v. *Labor Board*, 357 U.S. 93 (1958), in note 2, has applied the rule of *United States* v. *W. T. Grant*, 345 U.S. 629 (1953), to a dispute between companies and unions before the Labor Board over the hot cargo provisions of union contracts. The "sole question" in that case was whether the hot cargo provisions of

the collective bargaining agreements involved amounted to an unfair labor practice in violation of 29 USC § 158 (b) (4) (A). The *W. T. Grant* holding applied in the *Carpenters Union* case was that the case was not moot since the court could not say there was no danger of recurrent violation. No analysis of mootness in a case involving a labor dispute would be complete without the consideration of *Buffalo Forge* at note 8. In that case, the sympathy strike of a production and maintenance union took the form of those employees refusing to cross a picket line established by office and technical workers. Although the dispute between the office and technical workers and the company continued, the production and maintenance employees' sympathy strike had ended prior to the hearing of the case, but the strike might have been "resumed at any time in the near future at the direction of the international union or otherwise." 45 L.W. at 5348. The court held the case was not moot despite the return of the production and maintenance employees to the job, relying on *Super Tire* and *Bus Employees*. It stated that "[t]he presence of an existing dispute makes this a live controversy. . . ." 45 L.W. at 5348, note 8.

The importance of the holdings in *Buffalo Forge* and *Carpenters Union* are that in each of them the court applied, to disputes between companies and unions, the same mootness rules applicable in the cases in which there appeared a public interest such as the enforcement of a statute. And in both of those cases, which were suits between private parties over the construction of collective bargaining agreements and involving strikes which had ended during the pendency of the actions, the Court relied upon cases which had been decided in the context of the presence of a public order, statute, regulation, etc. This leads us to believe that the rules for ascertaining mootness

in public interest and private cases should be essentially the same. While it is true that courts may take a longer look at cases involving a public policy, statute, or regulation because of the continuing presence of such, we do not think it is true that different rules are applied. Indeed, since mootness is a jurisdictional principle, no sense of urgency brought about by the application of a public law, etc., should be able to confer jurisdiction on a court where it has ceased.

In this respect, we also note that the collective bargaining agreement here in question affects a substantial part of the entire bituminous coal industry in the United States. All signatory operators throughout the country are considered a single bargaining unit. See *United Mine Workers*, 179 NLRB 479 (1969). The Bureau of Mines weekly coal report of March 18, 1977, for example, shows that West Virginia produces more than 15% of the nation's bituminous coal, 2,086,000 tons in that week. The plan on file in this court for the disposition of criminal cases from the Southern District of West Virginia shows that in fiscal 1975 there were about 300 *Boys Market* injunction cases in the Southern District of West Virginia alone involving wildcat strikes. So, if the public interest is a *sine qua non* in determining whether or not the capable of repetition, yet evading review doctrine is to be applied, and we doubt that it is, we thing the public has an interest in having decided the questions which have arisen again and again between the parties here and which in the strike involved in these cases directly affected almost the entire bituminous coal industry of the nation.

Accordingly, we hold that the questions are not moot. Accord, *Atlantic Richfield Co.* v. *Oil and Chemical Workers Int. Union*, 447 F2d 945 (7th Cir. 1971).

VIII

A.

In each of the cases before us, there is no argument but that, aside from the question of the construction of *Buffalo Forge*, the necessary prerequisites for the issuance of *Boys Markets'* injunctions have been met as set out in that opinion at page 254, and no discussion of those various factors is either necessary or appropriate here.

B.

Our principal problem is to construe *Buffalo Forge* and apply it to the facts of these cases.

Certiorari was granted in *Buffalo Forge* because the Courts of Appeals were divided in their construction of *Boys Markets*, and the Court set *Buffalo Forge* in the context of a statement by the Court of Appeals that the strike in that case was not " 'over a grievance which the union has agreed to arbitrate' ". 428 U.S. at 404 (1976); 417 F2d at 1210 (2d Cir. 1975). In *Buffalo Forge*, two office and technical workers' locals of the United Steelworkers had been certified to represent the office and technical employees but were unable to consummate their first collective bargaining agreements with the company. They struck and established picket lines, as they had a right to do, in the prosecution of their demands. The office and technical workers' strike and pickets were, of course, a part of a classically legitimate strike. Two other locals of the United Steelworkers, representing the production and maintenance employees of the company, refused to cross the office and technical workers' picket lines. The production and maintenance workers had no separate quarrel with the company, but maintained they had a right to refuse to cross the picket lines despite a no-strike

clause in their contracts with the company. The only dispute the company had with the production and maintenance locals was whether or not they had a right to refuse to cross the office and technical locals' picket lines. The contracts of the production and maintenance locals also contained broad arbitration clauses. While the Court held, p. 410, that the issue of whether or not the production and maintenance locals' refusal to cross the office and technical picket lines was arbitrable under the contract: "[c]oncededly, that issue was arbitrable," the Court went on to hold that an injunction should not issue pending arbitration and stated that ". . . it does not follow that the district court was empowered not only to order arbitration but to enjoin the strike pending the decision of the arbitrator. . . ."

The Court reasoned that "[n]either its [the strike of the production and maintenance locals] causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and . . . [the production and maintenance locals], p. 407, 408.

We think the Court meant to tie together the non-arbitrability of the underlying cause with the cause of the strike at issue so that, when the underlying cause is not subject to arbitration, a refusal to cross a picket line, generated by a strike over the underlying cause, is not a violation of a no-strike clause which is enforceable by injunction against the strike[1a] although it may be by arbitration. In our opinion, the Court meant thus to restrict the holding of *Boys Markets,* which many cases had taken to be that if an issue were arbitrable, assuming other conditions were met, an injunction might isssue to prevent a strike pending arbitration of the arbitrable issue. Following

[1a] Pending arbitration of course.

Buffalo Forge, it seems that where the underlying issue is not arbitrable, then a refusal to cross a picket line set up on account of that underlying issue, although the refusal may be arbitrable, may not be prevented by injunction pending arbitration.

Our analysis is supported by note 9 in *Buffalo Forge* as it deals with the cases of the various circuits which are overruled at least by strong implication. In *NAPA Pittsburgh,*[2] Altoona Local 110, in a dispute over recognition, picketed the Pittsburgh location where Local 926 was the bargaining agent. The underlying dispute between Local 110 and NAPA Pittsburgh, representation, of course was not arbitrable, especially as between Local 926 and the company. In *Island Creek,*[3] a dispute arose between Local 680 and Florence Mining Company. Local 680 picketed Island Creek, which had as its local 988, both of the UMW. The nature of the dispute between Local 680 and Florence is not divulged in the opinion, but it is obvious that Island Creek could not have arbitrated an issue between Florence and Local 680. In *Armco,*[4] the pickets were to protest federal and State allocation of gasoline, a matter obviously not subject to arbitration in any context. In *Pilot Freight Carriers,*[5] Local 512, from Jacksonville, Florida was in dispute with Pilot over recognition. On account of that dispute, the employer was picketed at its Kernersville,

[2] *NAPA Pittsburg, Inc.* v. *Automotive Chauffeurs,* 502 F2d 321 (3rd Cir. 1974), cert. den. 419 U.S. 1049 (1974).

[3] *Island Creek Coal Co.* v. *Mine Workers,* 507 F2d 650 (3rd Cir. 1975), cert. den. 423 U.S. 877 (1975).

[4] *Armco Steel Corp.* v. *Mine Workers,* 505 F2d 1129 (4th Cir. 1974), cert. den. 423 U.S. 877 (1975).

[5] *Pilot Freight Carriers, Inc.* v. *Teamsters,* 497 F2d 311 (4th Cir. 1974), cert. den. 419 U.S. 869 (1974).

North Carolina installation, which had as its local 391, both Teamsters Locals. The underlying recognition dispute, of course, was not arbitrable in any context. In *Wilmington Shipping Company,*[6] employees of the Port Authority struck and picketed the Port of Wilmington. Local 1426 of Wilmington Shipping Company refused to cross the picket line, as it had a right to do if the picket line were bonafide. The dispute was over whether or not the picket line was bonafide, and the parties agreed that this was an arbitrable matter under the contract. It is seen, though, that Wilmington Shipping Company could not have agreed to arbitrate with Local 1426 the underlying dispute between the Port Authority and its employees. In *Monongahela,*[7] Local 2357 was in a dispute with the employer at Clarksburg over recognition and as a result picketed the employer at Panhandle, which had as its local 2332, both IBEW. It is seen that Local 2332 and the employer could not have arbitrated a dispute over recognition between Local 2357 and the same employer. In *Valmac,*[8] Local 425 had separate contracts with the employer at four towns in Arkansas. As a result of contract expirations at two of the towns and the resulting dispute, the employer's operations at the other two towns were picketed. The renewals of the contracts, of course, were not subject to arbitration. In *Associated General Contractors,*[9] Local 110, IBEW, picketed a job site on

[6] *Wilmington Shipping Co.* v. *Longshoremen*, 86 LRRM 2846 (4th Cir. 1974), cert. den. 419 U.S. 1022 (1974).

[7] *Monongahela Power Co.* v. *Electrical Workers*, 484 U.S. 1209 (4th Cir. 1973).

[8] *Valmac Industries* v. *Food Handlers*, 519 F2d 263 (8th Cir. 1975), vacated 428 U.S. 906 (1976).

[9] *Associated General Contractors* v. *Operating Engineers*, 519 F2d 269 (8th Cir. 1975).

which the electrical subcontractor was paying lower wages than Local 110 contracts would have provided for had it been on the job instead of Local 84 of the Christian Laborers Assocation, which had the electrical subcontracting labor. In a suit brought by the general contractor and the mechanical subcontractor against their locals which refused to cross 110's picket lines, it is seen that the underlying dispute, that of the lower wages paid to members of Local 84, was not subject to arbitration between the general and mechanical contractors and their locals.

The theme of all of these cases just named, and overruled at least by implication by the Supreme Court in note 9, is that either the underlying dispute was not subject to arbitration at all or at least it was not subject to arbitration by the defendant union and the company. Put another way, the central question to these cases seems to be: Is the object of the strike at hand to compel the company to concede an arbitrable issue?

Our conclusion as to the central question in cases such as the ones we have before us is further strengthened by the decisions listed in note 9 of *Buffalo Forge* as having been correctly decided.

In *Amstar,*[10] the company's installation at Arabi, Louisiana (Meat Cutters Local No. P-1101) was picketed by ILA pickets presumably in furtherance of an economic dispute with Amstar, whose contracts with longshoremen's locals had expired at Brooklyn, Philadelphia, and Boston. The underlying dispute, an economic one over contract expiration, was not arbitrable, of course. In *Plain Dealer,*[11] the Newspaper Guild was engaged in a lawful economic

[10] *Amstar Corp.* v. *Meat Cutters*, 468 F2d 1372 (5th Cir. 1972).

[11] *Plain Dealer Pub. Co.* v. *Cleveland Typographical Union*, 520 F2d 1220 (6th Cir. 1975).

strike and picketed the paper. The craft unions representing some of the other employees would not cross the picket lines. While neither the district court's opinion nor the per curiam affirmance of the denial of injunctive relief discloses the cause of the underlying strike of the Newspaper Guild, it seems to us doubtful that a lawful economic strike would be arbitrable at all. Thus, Amstar could not concede an arbitrable issue because there was none, and neither could the *Plain Dealer*.

Since the Supreme Court, at p. 407 of *Buffalo Forge*, has stated, in effect, that *Boys Markets* is not overruled, "*Boys Markets* plainly does not control this case," we take it that a correct construction of *Buffalo Forge* is to limit the application of *Boys Markets* so that it does not apply in cases where the only dispute between the company and the union is over the meaning or application of the no-strike provision, express or implied, which dispute has been brought about by a dispute which is not arbitrable. The production and maintenance locals' refusal to cross the picket lines in *Buffalo Forge* was plainly brought about by the dispute between the company and the office and technical locals, which underlying dispute[12] was not arbitrable. So, although the production and maintenance strike obviously was in an effort to compel the company to concede an issue to the office and technical locals, it was not to compel the company to concede an *arbitrable* issue.

We next apply these principles to the controversies between the unions and their respective companies here.

C.

Case No. 76-1793 involving Local 1759 and Cedar Coal Company.

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[12] See *Kentucky West Va. Gas Co.* v. *Oil, Chemical and Atomic Workers*, No. 76-1852 (6th Cir. 1977).

The best light that can be put on the strike by Local 1759 is that it commenced over the arbitrator's award in the dispute concerning the communications job and was accentuated by the discharge of the two employees for taking part in that strike. Not only were both of these disputes plainly subject to arbitration, they were in fact arbitrated. Indeed, the union filed a suit in the district court to enforce one of the awards.

Extended discussion of this as part of this case is not necessary because of a passage in *Buffalo Forge*, which is:

> "Contrary to the Court of Appeals, the employer claims that despite the Norris LaGuardia Act's ban on federal-state injunctions in labor disputes, the district court was empowered to enjoin the strike by § 301 of the Labor-Management Relations Act as construed by *Boys Markets* v. *Retail Clerks Union*, supra. This would undoubtedly have been the case had the strike been precipitated by a dispute between union and management that was subject to binding arbitration under the provisions of the contracts." p. 406.

The facts of Local 1759's strike fit squarely into this language, and it is clear that, on the facts alleged in the complaint, the refusal to hear the preliminary injunction was error.

We do not think valid the unions' defense that the nature of the strike changed. Their contention is that, following the district court's restraining order, additional causes to those just above set forth were that the company had filed a suit in the federal court to enforce the contract under *Boys Markets* and that the district court had issued its TRO pursuant to the company's suit. Were we to hold valid a defense in such cases, that the union may strike over the actions a court has taken in its consideration of the matter, such would amount to nothing more nor less than an over-

ruling of *Boys Markets* by the unilateral act of one of the parties and would abandon completely the function of the courts in these cases as set forth in *Boys Markets*. It would be just as tenable for a company which had been ordered to arbitrate by a court to refuse to do so as for a union to do the same thing.

D.

Case No. 76-1785, Local 1766 and Cedar Coal Company.

Local 1766 is the sister local of Local 1759, and it should be remembered that the dispute between Local 1759 and Cedar commenced this whole controversy. The facts in the complaint, which we must treat as true, allege that the strike of Local 1766 was over the arbitrator's rulings between 1759 and Cedar.

While the dispute may not technically have been "over a grievance which both parties are contractually bound to arbitrate," *Boys Markets*, p. 254, see *Buffalo Forge*, p. 404, because it is at least arguable that Cedar could not have conceded the arbitrable issue to Local 1766, it rather being engaged in arbitration with Local 1759, we think that construction of *Boys Markets* is too narrow here. Here, the employer is the same as to both Locals; the collective bargaining agreement is the same; the bargaining unit is the same; the locality of employment is the same; and, most importantly, the purpose of 1766's refusal to cross the 1759 picket lines was not to coerce Cedar into conceding an issue to Local 1759 which was not arbitrable; rather, the purpose of the 1766 strike was to coerce Cedar into conceding an issue to Local 1759 which was admittedly arbitrable. We also bear in mind that under the two-tier arbitration provisions of the collective bargaining agreement, Article XXIII, the award in the 1759 case apparently would

affect also Local 1766, for there are only three grounds of appeal to the Arbitration Review Board: that the decision of a panel is in conflict on the same issue with other panels; that the decision involves a new question of a substantial contractual issue; and that the panel decision is arbitrary, etc.

We think, then, that since the purpose of the strike of Local 1766 was to compel Cedar to concede an arbitrable issue to Local 1759, with the same employer, the same collective bargaining agreement, the same bargaining unit, and the cause of Local 1759 made its own, that the *Buffalo Forge* exception to *Boys Markets* should not apply, and assuming the arbitrability of the question of whether or not Local 1766 might be required to cross Local 1759's picket lines, it was error to dismiss the complaint.

E.

Case No. 76-1846, Local 1949 and Southern Ohio Coal Company.

The district court, in this case, found that the resulting work stoppage was "one of failure to cross a picket line maintained by other than the members of this particular local union."

The court did not find whether the purpose of the strike was merely to express sympathy for Local 1759's position or to require the concession of an arbitrable issue by either Cedar or Southern. But we do not think that a lack of more specific findings should justify reconsideration of that point. In this case, there was no dispute between Southern and Local 1949 which had anything to do with the picket line, or not crossing it, until after the picket line appeared. And, while the refusal to cross the picket line may have been an arbitrable dispute, it was the only dispute

between Southern and Local 1949. Even considering that the underlying purpose of 1949's strike may have been to put indirect pressure on Cedar to concede an arbitrable issue to Local 1759, Southern could concede nothing to Local 1759 because it was not bound to it by a collective bargaining agreement, and there was no dispute between Southern and Local 1759.[13]

Accordingly, we think the district court correctly denied a preliminary injunction pending arbitration in that case.

IX

This leaves the procedure on remand.

Our opinion is a rather narrow one, going only to the denial of injunctive relief pending arbitration in all three cases and in only one, No. 76-1785 (Local 1766) going to the outright dismissal of the complaint.

We think the issue of whether Local 1766 might be required to cross Local 1759's picket line was an arbitrable issue, and we think the same should be said of the refusal of Local 1949 to cross the picket line made up of UMW members, not necessarily from Local 1759. On remand, the district courts involved should direct those issues to be arbitrated forthwith, and when such arbitration has been completed, then consider those cases (No. 76-1785, Local 1766) (No. 76-1846, Local 1949) in the light of this opinion.

In these same cases involving Locals 1766 (No. 76-1785) and 1949 (No. 76-1846), the arbitration of the matter of whether those locals might be required to cross the picket lines established should be decided by the arbitrators prior to proceeding with the damages aspects of the cases. *Drake*

[13] The facts of this case are remarkably similar to *Island Creek*, supra, which the Supreme Court has indicated was decided wrongly in *Buffalo Forge*, note 9.

Bakeries v. *Bakery Workers*, 370 U.S. 254 (1962); *Valmac Industries, Inc.* v. *Food Handlers*, 519 F2d 263, 269 (8th Cir. 1975), vacated on other grounds, 428 U.S. 906 (1976).

X

The employees involved in all of these cases are long since back at work and for that reason alone, no presently existing need being shown, in our discretion we deny the request for an injunction pending appeal in case No. 76-1785 (Local 1766).

For the same reasons, in our discretion we dissolve the injunction previously issued in case No. 76-1793 (Local 1759), it being obvious that the district courts may grant temporary injunctive relief if otherwise authorized after remand in any of the cases.

An injunction pending appeal is denied in case No. 76-1846 (Local 1949) for the reasons expressed in this opinion affirming the denial of injunctive relief by the district court.

XI

It should not be implied that, because injunctions may have been authorized against Locals 1759 and 1766, such are presently required. As to that point, we express no opinion, as we also do not as to the various claims made for permanent injunctive relief and damages.

XII

In case No. 76-1785 (Local 1766), the judgment of the district court is vacated and the case is remanded for action not inconsistent with this opinion.

In case No. 76-1793 (Local 1759), the case is remanded for action not inconsistent with this opinion.

In case No. 76-1846 (Local 1949), the judgment of the district court is affirmed and the case is remanded for action not inconsistent with this opinion.

Paragraph X of this opinion and a separate order this date entered will dispose of case No. 76-8239 (Misc.) concerning the injunction pending appeal in case No. 76-1793 (Local 1759).

Supreme Court, U.S.
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JUN 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY AND
OHIO POWER COMPANY,

Petitioners,

— VS. —

UNITED MINE WORKERS OF AMERICA, UNITED MINE WORKERS OF AMERICA, District No. 6, AND UNITED MINE WORKERS OF AMERICA, LOCAL NOS. 1890, 1886 AND 1957,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1976

No. 76-1565

Southern Ohio Coal Company and
Ohio Power Company,

Petitioners,

— vs. —

United Mine Workers of America, United Mine Workers of America, District No. 6, and United Mine Workers of America, Local Nos. 1890, 1886 and 1957,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Questions Presented.

(A) Did the Sixth Circuit Court of Appeals in vacating the injunctions which had previously been issued by the district court properly delineate and apply the appropriate federal standards concerning the scope of injunctive relief permissible to enforce the arbitration provision of the collective bargaining agreement before it?

(B) Did the Sixth Circuit Court of Appeals properly apply the ordinary principles of agency in an action brought under 29 U.S.C. § 185 with regard to the liability

of a labor union, some members of which have engaged in a variety of unauthorized work stoppages?

(C) Did the Sixth Circuit Court of Appeals properly and consistently apply this Court's decision in *Buffalo Forge Company* v. *United Steelworkers of America*, 428 U.S. 397 (1976), under circumstances where various UMW members refused to cross the picket line established by stranger pickets who may have been members of the same International union and may have been governed by the same collective bargaining agreement?

II. Statement of the Case.

Respondents herein adopt petitioners' statement of the case concerning its procedural and factual history, with the following exceptions:

(A) Respondents object to the characterizations by petitioners of "the union's no-strike obligation." Respondents agree that there is an arbitration provision in the collective bargaining agreement in force between the parties. The agreement does not contain a no-strike provision. It is the question of the extent to which that arbitration provision creates an obligation on the part of the union not to strike which forms the basis for much of the controversy involved in this, and related actions.

(B) Respondents object to petitioners' statement concerning the District Court's findings in its Order of September 9, 1975 (Appendix. pp. 15a-23a). Specifically, petitioners' statement that "the District Court found that . . . the strikes were over arbitrable issues and, thus, in violation of the union's implied no-strike agreement" is inaccurate for two reasons: (1) the District Court did not characterize the arbitration provision as an "implied no-strike agreement," and, (2) the District Court specifically found that the members of the local unions were justified in refusing to cross picket lines composed of masked pickets and in refusing to work for a total of three days following the shooting of a union member by a masked picket. There was no finding by the District Court that the stoppages occasioned by masked pickets and violence in any way constituted arbitrable issues.

(C) Respondents object to petitioners' description of the picketers demonstrating at the three subject mines in July of 1976 as being United Mine Workers' members. There is no evidence in the record which accurately identifies the stranger pickets as members of the United Mine Workers of America. Rather, for purposes of its ruling, the Sixth Circuit simply assumed that the picketers were a "roving band" of mine workers.

(D) Respondents object to petitioners' characterization of the Sixth Circuit's decision as failing to apply certain accepted principles of federal labor law. Petitioners' statements herein concerning the basis for the Sixth Circuit's decision should more properly be contained in the argument portion of their brief. Specifically, however, respondents object to petitioners' statements that the Sixth Circuit "reject[ed] the application of certain agency principles as required by 29 U.S.C. § 185," and that it "rejected the conclusion of the Seventh Circuit" in *Old Ben Corp.* v. *Local No. 1487, United Mine Workers*, 500 F.2d 950 (7th Cir. 1974), concerning a past pattern and practice of striking over arbitrable issues and its underlying rationale.

(E) Finally, respondents object to petitioners' statement that pickets at the subject mines in July of 1976 were seeking support of a strike "in violation of the mandatory arbitration provisions of the same collective bargaining agreement" which governs respondents. There is no evidence in the record detailing the full scope and nature of all the disputes which had occasioned the widespread picketing or establishing that any of these disputes violated the arbitration provisions of this or any other collective bargaining agreement.

III. Reasons for Denying the Writ of Certiorari.

The decision of the United States Court of Appeals for the Sixth Circuit should not be reviewed because:

(A) It properly applies decisions of this Court and other courts of appeals concerning the scope of injunctive relief permissible to enforce the arbitration provisions of a collective bargaining agreement so as to avoid unnecessary involvement by federal courts in the private agreements of the parties.

(B) It is entirely consistent with decisions of this Court concerning the application of ordinary principles of agency in actions brought under 29 U.S.C. § 185 with regard to the liability of a union for the actions of some of its members.

(C) It properly applies this Court's recent decision in *Buffalo Forge Company* v. *United Steelworkers of America, supra,* in the context of a sympathy strike, as have other courts which have had the benefit of the *Buffalo Forge* decision.

The Sixth Circuit established no new precedents in its decision, but rather reiterated basic principles of federal labor policy which have been enunciated by this Court and followed by a variety of circuit courts of appeals. Therefore, there is a decided absence of special and important reasons for this Court to review the case and petitioners' request for a Writ of Certiorari should be denied.

A. The Sixth Circuit's Decision Is Entirely Consistent With Decisions of This Court Concerning the Extent to Which Injunctive Relief Is Appropriate to Enforce Arbitration Provisions of a Collective Bargaining Agreement, and the Permissible Scope of Such Relief.

Petitioners' argument that the Sixth Circuit's decision unduly restricts the scope of remedial injunctive relief in the context of a collective bargaining agreement ignores the indisputable breadth and vagueness of the preliminary injunctions which the Sixth Circuit vacated. These injunctive orders by their terms purported to forbid *any further work stoppages whatever* for the entire life of the agreement. To argue that these particular orders fall within the *narrow* exceptions to the anti-injunction provisions of the Norris-LaGuardia Act described in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970), as further limited by *Buffalo Forge Co.* v. *United Steelworkers of America, supra,* is to ask this Court to ignore all of the previous limitations which it has established concerning the propriety and advisability of granting injunctive relief to enforce the arbitration provisions of a collective bargaining agreement.

Petitioners argue at length that reversal of the Sixth Circuit's decision will "protect private interests" and "vindicate the public good by avoiding labor strife." It is un-

clear how the granting of an injunction so broad as to encompass matters which respondents have not agreed to submit to arbitration will serve to improve relations in the labor/management context and promote either private or public interests. Rather than concede the obvious defects of vagueness and overbreadth contained in these earlier orders, which were made glaringly apparent by this Court's decision in *Buffalo Forge, supra,* petitioners have elected, by attempting to revive and enforce these orders, to aggravate an already troublesome situation, and to exacerbate labor relations between the parties which already should appropriately be characterized as "strained." Such a legal stance can hardly be construed as one "promoting industrial peace."

This Court in *Buffalo Forge* reaffirmed and reemphasized that the *Boys Markets* rationale, wherein a limited exception to the Norris-LaGuardia Act's ban on federal court injunctions in labor disputes was carved out, was indeed a "narrow one." In doing so, this Court cited with approval the statement from *Sinclair Refining Company* v. *Atkinson,* 370 U.S. 195, 225 (1962), that "there is no federal anti-strike policy." Subsequently, the Sixth Circuit in its decision herein accepted and applied this Court's teachings in *Buffalo Forge,* observing that *Buffalo Forge* further narrowed the permissible scope of injunctive relief first recognized in *Boys Markets.* The Court recognized that under the facts before it, a work stoppage caused by a local union's refusal to cross a picket line established by another local union does not constitute a dispute which the parties have agreed to submit to arbitration. The Sixth Circuit's recognition and application of the principles of *Boys Markets* and *Buffalo Forge* was persuasively stated in the following manner:

> . . . It is only when an injunction is required to vindicate the contractual arbitration process that the anti-injunction policy of the Norris-LaGuardia Act will be accommodated to satisfy the public policy favoring peaceful settlement of labor disputes through arbitration. *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. at 253. *The key to issuance of a Boys Markets injunction is a finding that the issue underlying the work stoppage is arbitrable.* In this case, however, the District Court found that there was "no arbitrable grievance underlying the work stoppage," but rather the work stoppage resulted from the miners' reluctance to cross the stranger picket lines. *Thus, as in Buffalo Forge, whether motivated by sympathy or fear of reprisal, the work stoppage was not caused by an arbitrable dispute between the mine workers and the employer.* The strike had "neither the purpose or the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain." . . . (Emphasis added)

Appendix, p. 39a.

Clearly, therefore, the injunctive orders vacated by the Sixth Circuit purporting to enjoin any work stoppage, including one due to the presence of stranger pickets, were impermissibly overbroad. As noted by the Court in its decision, "the absence of an express no-strike clause in the contract is fatal to the company's claim of arbitrability," and therefore "the issue of the union's right to refuse to cross a picket line is not even arguably arbitrable." Appendix, pp. 40a-41a.

Contrary to petitioners' assertion, nothing in the Sixth Circuit's decision indicates that it will not issue a prospective injunction when a union has exhibited a propensity to

strike over arbitrable disputes. Rather, the court reviewed precedent from other circuits, and incorporated the most persuasive arguments from each in fashioning a decision consistent with both *Boys Markets* and *Buffalo Forge*. While there is undeniably a divergence of opinion as to the question of when a prospective injunction may issue, respondents believe that the Sixth Circuit has struck a proper balance which carefully reflects this Court's controlling guidelines.

The court explained its reasoning as follows:

> . . . In summary, the circuit precedents on the permissible breadth of injunctive relief in § 301 actions are far from uniform. The Tenth, Ninth and Third Circuits would appear to sanction prospective injunctive relief against specifically identified contractual violations which have occurred in the past and are likely to recur in the future. The Seventh Circuit would permit an injunction as broad as a contractual arbitration clause, and the Fifth Circuit would seem to bar any injunctive relief against future strikes.
>
> We prefer to take an intermediate position. We see nothing in *Boys Markets* that is inconsistent with a grant of prospective injunctive relief in the exercise of § 301 jurisdiction . . .
>
> • • •
>
> . . . Once a court has found that a union is engaged in a continuing practice of striking over arbitrable disputes and the *Boys Markets* guidelines are satisfied, we believe that the ensuing injunction may be extended to encompass future strikes over disputes similar to those which caused strikes in the past.

Appendix, pp. 48a, 50a.

In so applying *Boys Markets*, the Court also shunned the "indiscriminate issuance of blanket injunctions by overzealous courts" which could, in the Court's words, "signal a return to the pre-Norris-LaGuardia era of ad hoc sweeping anti-strike decrees." Appendix, p. 50a. It is such a blanket injunction which the Sixth Circuit vacated and which petitioners herein seek to resurrect, contrary to the express principles of *Boys Markets*.

Further, the Sixth Circuit recognized that the granting of overly broad, blanket injunctions unduly involves federal courts in what is a labor/management problem, and promotes neither arbitration nor industrial peace:

> We note however, that a court called on to supervise a blanket injunction runs a grave risk of becoming ensnarled in the private relationship of the parties and substituting its interpretation of the collective bargaining agreement for that of the arbitrator. An overbroad injunction presents the same risk of *excessive judicial entanglement* that led the Supreme Court in *Buffalo Forge* to reject the argument that the arbitrability of the scope of the no-strike clause was itself sufficient basis for a *Boys Markets* injunction. . . . An overbroad injunction inhibits the exercise of important employee rights and *induces the employer to resort to the courts for contempt proceedings* rather than to submit disputes to arbitration. *Thus, an overbroad injunction sacrifices the national policy of avoiding interference in the private economic affairs of the parties without furthering the cause of arbitration.* (Emphasis added)

Appendix, pp. 50a-51a.

The Sixth Circuit recognized that the injunctions which it vacated amounted to nothing less than court orders for all miners to report to work daily during the life of the agreement. The orders ignored rights which respondents had not given up through the collective bargaining agreement and were impermissibly overbroad under the tests of both *Boys Markets* and *Buffalo Forge*. Affirmance of the District Court's order would improperly expand the scope of remedial injunctive relief in such a fashion as to foster strife and additional litigation, along with inappropriate resort to the federal courts' contempt powers by management.

The Sixth Circuit's careful application of this Court's previous decisions indicates that there is no persuasive, special or important reasons for reviewing its decision.

B. The Sixth Circuit's Decision Is Entirely Consistent With the Decisions of This Court Concerning the Application of Ordinary Agency Principles to a Labor Union in Actions Brought Under 29 U.S.C. § 185.

Petitioners' assertion that the Sixth Circuit "excluded" the application of ordinary agency principles pertinent to this action contrary to this Court's decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), is not well taken. This Court recognized in *Gibbs* that in actions brought under the Labor Management Relations Act, such as the present one, a union's responsibility for the acts of its members and officers is to be measured by ordinary doctrines of agency. These basic principles require evidence that the union has authorized, participated in, encouraged, ratified or condoned unlawful activity before liability will attach. It is these basic principles which the District

Court and the Sixth Circuit applied, and accordingly, there is no compelling reason for this Court to review the Sixth Circuit's decision in this regard.

The District Court and the Sixth Circuit properly recognized that the mere fact that the District and the International unions had received notice of the stoppages was not sufficient evidence to justify extending injunctive relief against those parties. Neither District 6 nor the International had instigated or provoked the stoppages. Appendix, p. 33a. The Sixth Circuit properly held that "a union may only be held responsible for the authorized or ratified actions of its officers and agents," recognizing at the same time that a union's "studied ambivalence" to unauthorized stoppages may in certain circumstances constitute sufficient inducement, encouragement and condonation to expose the union to liability. Appendix, p. 34a.

The Court further remarked that in most instances encouragement or ratification of unauthorized stoppages occurs in circumstances in which the union is attempting "to bring pressure to bear on the employer and reap the benefits of the illegal work stoppage." Appendix, p. 34a. There is simply no suggestion in the record of any improper motivation on the part of either the District or the International related to the work stoppages. In the absence of such evidence, there is no legal basis, under the ordinary principles of agency law, for holding either the District or the International responsible for these unauthorized stoppages.

Respondents recognize that certain circuit court decisions cited by petitioners do appear to favor a liberal "mass action" or "best efforts" approach concerning a un-

ion's liability for unauthorized stoppages. However, the majority of these cases contain an express finding by the court that the union ultimately found liable had at least implicitly encouraged or condoned the unlawful activity.

For example, in *Wagner Electric Corp.* v. *Local 1104, International Union of Electrical, Radio and Machine Workers,* 496 F.2d 954 (8th Cir. 1974), the Court observed that where liability is based upon principles of agency pursuant to 29 U.S.C. § 185(e), the determination of authorization and ratification is largely a question of fact based upon the credibility of the witnesses and the weight of the evidence. The Court found that the union was responsible for the strike for a variety of reasons, including suspect circumstances surrounding union meetings, actual involvement of union officers in initiating the strike, participation by all 2,700 members in the strike, and extremely token efforts taken by union officers toward attempting to end the strike. Clearly, there is no similar evidence in the matter before the Court concerning involvement in the stoppage, or lack thereof, by officers and representatives of District 6 and the UMWA International.

Similarly, in *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971), the Court found that agents and representatives of the unions were directly involved in engaging in or inducing illegal activity, and by reason of their direct participation in the strike, the unions were found to have acquiesced in and condoned the illegal strike. In fact, the District Court found that the strike was actually *conducted* by both the Local and the International unions as a "joint venture." No such finding was made by the District Court

in the present matter, nor would such a finding be proper under the evidence produced at the injunctive hearing.

Finally, the court's decision in *Eazor Express, Inc.* v. *International Brotherhood of Teamsters,* 520 F.2d 951 (3rd Cir. 1975), *cert. denied* 424 U.S. 935 (1976), requiring a union to use *all reasonable means* available to it to end an unauthorized strike, imposes a harsh, unwarranted and impossible standard for determining liability of large national unions which in reality have little or no power to control the day-to-day activities of their members at the local level. Further, it would compel respondents to undertake duties not specifically imposed by the agreement. *Eazor Express,* which involved an *express* no-strike provision, fails to recognize the practical problems imposed upon the International Union in disciplining its own members under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, et seq. (see, e.g., *Monborne* v. *United Mine Workers of America,* 353 F. Supp. 255 (WD Pa. 1973)), and is not widely followed throughout the various circuit courts.

The Sixth Circuit properly applied the pertinent principles of agency to the facts before it, consistent with this Court's previous decisions regarding a union's liability for acts of its agents and representatives. The fact that some distinctions appear to exist in other circuit courts concerning the application of these principles does not require this Court to review the Sixth Circuit's proper interpretation of the law of agency in the present matter.

C. The Sixth Circuit's Decision Properly and Consistently Applied the Decision of This Court in *Buffalo Forge Co.* v. *United Steelworkers of America* to the Circumstances of the Case.

Petitioners' objection to the Sixth Circuit's "mechanistic" application of this Court's decision in *Buffalo Forge, supra,* is simply without legal or logical justification. The Sixth Circuit interpreted and applied the rationale of *Buffalo Forge* in a manner wholly consistent with this Court's decision and in much the same fashion as have other courts which have subsequently had the opportunity to review and apply *Buffalo Forge.*

Petitioners suggest in their brief that two basic factual differences between the case now before the Court and *Buffalo Forge* require a different legal standard to be applied, namely, (1) the primary strike here was arguably not a "legal" economic strike and (2) the picketers involved in the primary strike were governed by the same collective bargaining agreement which controls the employees who refused to cross the picket lines. The Sixth Circuit quite properly rejected the argument that these factual variations are distinctions with no legal import whatever, and petitioners' resurrection of this contention in their brief does not provide this Court with any justification for reviewing the decision of the Sixth Circuit.

The Sixth Circuit correctly noted that the legality or illegality of the primary picketing in a sympathy strike situation is not a valid basis for differentiating between actions which are protected by *Buffalo Forge* and those which are not. The Court recognized that such a distinction would improperly direct the Court's attention toward the primary picketers and away from the parties sought to be enjoined:

> The glaring defect in this argument is that it improperly shifts the focus of the court's inquiry from the employees against whom the injunction is sought to the illegal pickets. Not only does this raise problems of proof because the initial strikers will often not be parties to the action, but it also places the burden of making complex judgments as to the legality of the primary line on the employees faced with the decision whether or not to cross. If they refuse to cross, they run the risk of injunction, damages and civil contempt. Both *Boys Markets* and *Buffalo Forge* teach quite explicitly that the proper focus of judicial attention in a § 301(a) injunctive action should be on the employees sought to be enjoined. . . . The legality of the primary picketing is irrelevant.

Appendix, pp. 38a-40a.

Further, even if the record established, which it does not, that the primary picketers were members of the United Mine Workers of America engaging in an illegal strike, the local union's actions in refusing to cross the picket lines clearly do not constitute ratification of the strike or adoption of the goals of the picketers as their own. The additional argument that since respondents herein are governed by the same collective bargaining agreement which may control the primary picketers, they must receive a tangible benefit by honoring their picket lines, is simply without factual justification. The Sixth Circuit rejected these contentions of petitioners in the following manner:

> Thus, the employer reasons, the membership of the local unions stands to benefit from resolution of the

> primary strike favorable to the mineworkers. Just why this is so the Company does not elaborate. . . . The Bituminous Coal Wage Agreement provides that local disputes be grieved and arbitrated on a mine-by-mine basis. The only benefit to be derived by the local unions from favorable settlement of the West Virginia strike is indirect, at best, and highly speculative. Accordingly, the bare assertion that all mine workers are members of the same bargaining unit and working under a national contract adds little to the central inquiry in *Boys Markets* cases—whether the employees sought to be enjoined are striking over issues which they have agreed to arbitrate.

Appendix, pp. 37a-38a.

The petitioners' assertion that application of the principles of *Buffalo Forge* to a "substantively different factual and legal setting" somehow erodes the arbitration process agreed upon in the collective bargaining agreement ignores the controlling fact that the right to engage in a sympathy strike or honor a stranger picket line is not a matter which petitioners' employees have agreed to submit to arbitration. Under the circumstances of this case, there simply is no grievable dispute which the parties are contractually bound to arbitrate. As was recognized by the Sixth Circuit in its decision, all nine justices of this Court in *Buffalo Forge* agreed that an implied no-strike agreement does not extend to sympathy strikes.

In *Buffalo Forge*, this Court stated that the question of the right to engage in a sympathy strike under the contract before it was arguably subject to the arbitration provisions of the contract in view of the *express* no-strike

clause contained therein. This same question was not before the Sixth Circuit, since the 1974 Wage Agreement contains at most a limited and *implied* no-strike obligation. Appendix, p. 40a. *Gateway Coal Company* v. *United Mine Workers of America*, 414 U.S. 368 (1974). Thus, the right of respondents to engage in work stoppages due to the presence of stranger pickets is not even *arguably* subject to the arbitration provisions of the 1974 Wage Agreement.

Accordingly, the additional teaching of *Buffalo Forge*, that a court cannot issue a *Boys Markets* injunction unless the subject matter of the dispute between the union and the employer is *clearly arbitrable*, or unless it has been found to be arbitrable by an arbitrator, also support the Sixth Circuit's decision. In the absence of an arbitrable grievance underlying the work stoppage, there is simply no grievable dispute to be arbitrated. Therefore, there can be no improper circumvention of the arbitration provisions of the contract.

The Sixth Circuit is not alone in interpreting and applying the teachings of *Buffalo Forge* in the manner in which it did. For example, in *U.S. Steel Corp.* v. *United Mine Workers of America*, 418 F. Supp. 172 (WD Pa. 1976), U.S. Steel sought injunctive relief against one of its United Mine Workers locals. The District Court relied upon this Court's decision in *Buffalo Forge* to support its denial of injunctive relief:

> . . . Nor do we believe that *Buffalo Forge* is distinguishable because the primary dispute in that case precipitated a legal strike while the one in West Virginia appears, from our limited knowledge of it, to be illegal. These differences are immaterial because the primary thrust of *Buffalo Forge* lies in the fact

> that the cause of the secondary work stoppage was not amenable to the arbitration provisions of the relevant labor contract (and one, incidentally, that contained an express no-strike clause). Since *Buffalo Forge* squarely addressed the question of whether a federal court may enjoin the sympathy strike—and answered it negatively—Local 6321's decision not to work cannot be disturbed by a district court injunction, if such strike is carried out in support of their union brethren.

418 F. Supp. at 174-175.

Similarly, in *U.S. Steel Corp.* v. *United Mine Workers*, 548 F.2d 67 (3rd Cir. 1976), the Court rejected many of the arguments put forth by petitioners herein concerning the legality of a primary strike which eventually forced U.S. Steel's Robena Mine to close down in deference to stranger pickets:

> U.S. Steel contends that the Robena work stoppage was in fact "over" an arbitrable dispute. . . . U.S. Steel thus attempts to distinguish this case from *Buffalo Forge* on the ground that the Humphrey strike, which triggered the Robena work stoppage, was an illegal work stoppage over disputes subject to arbitration, whereas the primary dispute in *Buffalo Forge* was concededly legal.
>
> . . . We think it sufficient to dispose of U.S. Steel's contention by observing that the Robena strike was not over any dispute "between the union and the employer"—between UMW and U.S. Steel—that was subject to arbitration.

548 F.2d at 73-74.

Clearly, the Sixth Circuit has joined other courts in interpreting and applying *Buffalo Forge* in a manner wholly consistent with this Court's decision. The variety of factual settings present in these cases fit comfortably within the standards which this Court has pronounced concerning the circumstances in which a sympathy strike can be enjoined. In the present instance, respondents have not contractually obligated themselves to forego their right to engage in a sympathy strike, and accordingly the Sixth Circuit's decision on this issue is in complete accord with *Buffalo Forge*.

IV. Conclusion.

The Sixth Circuit's decision in this case consistently applies principles which have been enunciated in numerous decisions of this Court regarding the scope of injunctive relief permissible to enforce the arbitration provisions of a collective bargaining agreement, the standards for adjudging union accountability for the actions of its members, and the propriety of injunctive relief under the circumstances of a sympathy strike. This decision represents a uniform and well-reasoned application of widely recognized federal labor policy as enunciated by this Court and the various circuit courts of appeals which have interpreted and followed this Court's guidelines. The issues contained herein are neither novel nor previously undecided, and are critical to the petitioners herein only in the sense that they have been determined adversely to their interests, in strict accordance with this Court's previous dictates. It is respectfully submitted that this case contains no special

and important issues which would make it appropriate for review and consideration by this Court, and that therefore, the Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY AND OHIO POWER COMPANY, *Petitioners,*

vs.

UNITED MINE WORKERS OF AMERICA, UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 6, AND UNITED MINE WORKERS OF AMERICA, LOCAL NOS. 1890, 1886 AND 1957, *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE BITUMINOUS COAL OPERATOR'S ASSOCIATION, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Bituminous Coal Operators' Association, Inc. ("BCOA"), by its undersigned counsel, not having received consent of the Respondents, moves pursuant to Rule 42 of the Supreme Court Rules that the Court

grant it leave to file the enclosed Brief *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by Southern Ohio Coal Company and Ohio Power Company.

BCOA'S INTEREST AND WHY THE FILING IS DESIRABLE

BCOA is a national association of bituminous coal producers, organized in 1950 and continuing in being until the present time. BCOA has approximately 50 direct members and some local coal association members, including the major coal producers in all of the bituminous coal mining states. Its members produce about 75 percent of the coal mined under the National Bituminous Coal Wage Agreement. BCOA negotiates and assists in interpreting this Agreement.

BCOA was organized for the purpose of attempting to help bring stability out of chaos in employer-employee relations in the coal industry. These efforts have been successful to a large degree, but the continued increase in the incidence and magnitude of wildcat strikes in recent years has presented an imminent threat to the production of coal and to the stability of employment in the coal industry.

This case is before the Court on a Petition for a Writ of Certiorari by the Southern Ohio Coal Company and the Ohio Power Company. If the Writ is issued, the Court's decision should establish legal guidelines to determine the application of the recent *Buffalo Forge* decision, 428 U.S. 397, 96 S.Ct. 3141 (1976), to the recurring wildcat strikes in the coal industry. This will have substantial and even crucial impact on the effectiveness and integrity of the agreements between BCOA and the United Mine Workers of America ("UMWA")

and on the ability of the bituminous coal industry to meet the Nation's need for coal.

All BCOA members will be affected by the decision of this Court.

WHEREFORE, BCOA moves the Court to allow the filing of the Brief *Amicus Curiae,* which is submitted herein with the requisite number of printed copies.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE BITUMINOUS COAL OPERATOR'S ASSOCIATION, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BCOA'S INTEREST

The Bituminous Coal Operators' Association, Inc., herein called "BCOA", is a national association of coal operators, organized in 1950 for the purpose of negotiating and assisting in interpreting BCOA's national agreements with the United Mine Workers of America, herein called "UMWA". BCOA has approximately 50

members who operate in all of the bituminous coal mining states and who collectively produce approximately 75 percent of the bituminous coal mined under the National Bituminous Coal Wage Agreement of 1974, herein called the "1974 Agreement".

BCOA was formed against the backdrop of the labor strife in the coal industry during the 1940's a period characterized by strikes and Government seizures of the coal mines. BCOA's purpose was to create more stable labor relations and to establish and maintain harmonious relationships between the coal operators and their employees and their employee representative, the UMWA. For a period of time these efforts were successful in that since the early 1950's a succession of national labor agreements have been negotiated between BCOA and UMWA without any seriously prolonged or crippling economic strikes. Escalating wildcat strikes now threaten all this progress.

The latest contract renewal was the 1974 Agreement which became effective in December 1974 to run for a three-year period. This Agreement was hailed as one of the most progressive labor agreements ever negotiated. It provides for wage and benefit levels which are at least as beneficial to the miners as those in any other major industry. It also contains provisions for the handling of grievances and for various types of expedited arbitration over a broad range of issues. All local grievances, disputes or local trouble of any kind are subject to final and binding settlement through the grievance-arbitration procedures of the agreement. There is no labor agreement of record that contains any broader grievance-arbitration clauses.

The griveances at the local mine level which are not settled are assigned by rotation to panel arbitrators.

These panel arbitrators are empowered to hear the grievances and to render final and binding decisions. The panel arbitrator's decision is subject to review by an Arbitration Review Board, composed of representatives of each party and a permanent neutral umpire selected by BCOA and UMWA.

The function of the Arbitration Review Board is to resolve conflicts in panel arbitrator decisions, to determine whether a panel arbitrator's decision is arbitrary, capricious, or fraudulent, and to decide questions of contractual interpretations affecting the industry as a whole. There are special expedited procedures for discharge cases, and for handling safety disputes. The pertinent contract provisions are set forth in Appendix A.

The provisions for grievance handling and arbitration are fully functioning. The number of arbitrations has steadily increased since 1974. The procedures are readily available; and they are being used by the vast majority of the coal miners to resolve their grievances.

But, unfortunately, there are a relative few coal miners who from time to time take the law in their own hands to engage in wildcat strikes over a local grievance or dispute. A local strike is sometimes escalated into a widespread wildcat strike encompassing all or several UMWA districts. Such escalation is normally brought about by "roving" pickets who fan out over the coal fields and shut down mine after mine in order to mount increasing pressure on the mine of origin to forego arbitration and give in to the grievance.

Despite the forward-looking 1974 Agreement, stability of employment in the coal industry has steadily worsened since that Agreement was signed. There were more wildcat strikes in the bituminous coal industry in

1974 than ever before in history. The record in 1975 was worse than in 1974; in 1976 it was worse than in 1975; and 1977 will be the worst year yet. The losses in wages, production, and revenue to the Health and Retirement Funds for 1973, 1974, 1975, 1976, and the first four months of 1977 are set forth in Appendix B.

In recent years, there have been periodic wildcat strikes of major proportions in progress in coal, sometimes engulfing all or part of several major coal producing states. In the summer of 1976, for example, it is estimated that approximately 80,000 coal miners were idled by a wildcat strike which started at a single mine in West Virginia over the classification of one job.

The particular work stoppage in West Virginia was at a single mine and was over a clearly arbitrable issue —an issue that *was* indeed arbitrated. It caused the shutdown of over one-half of the total production of bituminous coal in the Nation. It inflicted severe losses on coal production, on the coal miner, on the Health and Retirement Funds, on the coal communities, on the coal States, and on the Nation. There have been other widespread wildcat strikes since that time.

Apart from the other astronomical economic losses arising from these wildcat strikes, they pose an imminent threat to the Health and Retirement benefits of the active miners and the 80,000 pensioners.

In the 1974 Agreement, the mine operators agreed to double their contributions to these Trust Funds (which had also been done in 1971) and to dramatically increase the pensions both for present pensioners and for the future pensions of active miners. The health and medical benefit plans in the bituminous coal industry are among the most liberal in the Nation.

But, the contributions to these trust funds by employers are based on a combination of tons of production and cents per hour for hours actually worked. Consequently, the financial stability of these funds depends directly on the continuing and uninterrupted production of coal. This stability has been threatened by the rising level of wildcat strikes to the point where the health trusts for active and retired miners are in a bankrupt positon. The Board of Trustees, the Chairman of which is appointed by the UMWA, has issued statements warning of the serious damage to the miners' Health and Retirement benefits arising from the recurring incidence of wildcats. The two benefit funds are in virtual bankruptcy. (See Appendix C).

BCOA and its members have a grave and continuing interest in preserving the integrity of the periodic agreements negotiated with the UMWA, in preserving the grievance-arbitration procedures of those agreements, and in maintaining employment stability and production of bituminous coal. BCOA and its members also have a similar direct interest in the stability of the Health and Retirement Funds.

Recurring and escalating wildcat strikes are, to our knowledge, a phenomenon not found in any other industry to any similar degree. But in the coal industry, they are a serious and mounting threat to the nation's economy.

BCOA does not believe in nor advocate the settlement of labor disputes in the courts. BCOA encourages the settlement of disputes by the grievance-arbitration procedures of the agreement. But the courts must perform their traditional role of establishing the parameters of lawful conduct in order that the parties to labor

disputes are made aware of their mutual rights and obligations.

Because of its direct and overriding interest in improving labor relations, promoting labor peace, insuring stability of employment, and encouraging respect for the agreement, BCOA files this brief to respectfully bring to the attention of this court the scope and seriousness of the issues which are before it.

REASONS FOR GRANTING THE WRIT

Southern Ohio Coal has presented three questions for review; all are important issues. BCOA supports the postion of Southern Ohio Coal Company on each of these issues.

1. Pattern and Practice Strikes over Arbitrable Grievances.

Question A deals with whether a district court has the power to enjoin a labor union from engaging in a "pattern or practice" of striking over arbitrable issues in a situation where that union has a history of engaging in repeated strikes over a variety of arbitrable issues.

There is, as pointed out in detail in the Petition, a conflict in the Circuit Courts on this issue which is a nationally important one and should be resolved. The court below, while granting that some prospective relief was permitted, gave an unrealistically narrow scope to such relief, and vacated the district court's injunction.

The grounds by which the injunction was vacated, and indeed the lower court's view of the controlling principle, are far from clear. The court states that,

> "We join those courts which have concluded that granting prospective injunctive relief in appropriate cases is consistent with the accommodation reached in *Boys Markets* between the policies of Norris-La Guardia and the public policy encouraging peaceful settlement of labor disputes through arbitration."

But, says the court, "prospective injunctions should only be granted in extreme cases." Then the court attempts to sum up its philosophy as follows:

> "Before an injunction may issue which grants prospective relief, the District Court should expressly find: That the present strike may be enjoined under *Boys Markets;* that the union has engaged in a pattern of strikes over arbitrable grievances that is likely to continue; that the strikes constituting the pattern of violation would warrant relief under the *Boys Markets* formula; and, that the decree is limited to specifically identified areas of dispute which have already been adjudicated and which satisfy the *Boys Markets* guidelines."
> [footnote omitted]

The rule as so stated is confusing to say the least and close to being unintelligible. It provides no clear guide to the district courts. The only thing that is clear from the entire tenor of the court's opinion is that it is intended to be highly restrictive, and not to allow in simple terms a prospective injunction which prohibits future strikes over arbitrable issues. In this unduly restrictive approach it clearly conflicts with the views of the Seventh, Ninth, and Tenth Circuits, as the court below itself concedes.

The final proviso of the lower court's articulation appears to say that the only strikes that can be prospectively enjoined (even if all other criteria are met) are

strikes over disputes which have previously occurred and have been arbitrated.

That type of injunction amounts to little more than the enforcement of prior arbitration awards. This is obviously very narow since it is unlikely that the exact dispute will recur. It is more likely that subsequent strikes will relate to other issues which, while clearly arbitrable, have not arisen before and have not been adjudicated.

Since a pattern and practice of strikes over arbitrable issues is characteristic of the coal industry, the question is one of national importance and the rule needs clarification.

2. Responsibility of Union for Acts of its Members

Question B relates to the responsibility of a labor union for the actions of its members at a particular work site who repeatedly engage in strikes over arbitrable issues; and the union, with continuing knowledge of the strike activity, takes no action to prevent or to end such strikes.

This question brings into play the so-called "mass action" principle. It is an important question in the coal industry for, again, this situation is characteristic of the coal miners' union.

We adopt Petitioners' arguments with respect to this issue.

The court below acknowledges that on this issue, as well as on Question A, it is out of step with other Courts of Appeals; the court refused to follow "ordinary principles of agency law" and to hold the District and International liable for failing to use reasonable means avail-

able to them to attempt to end unauthorized strikes. Instead, the court below chose to follow its own opinion in *Peabody Coal,* 543 F.2d 10 (6th Cir. 1976). The court flatly holds that the union may only be held responsible for the authorized or ratified actions of its officers and agents, and cannot be required to use its best effor to curtail an illegal strike.

If this view of the law prevails, it will only serve to place the stamp of judicial approval on the spreading blight of wildcat strikes in the coal industry. It means that the union can negotiate periodic national agreements with BCOA and then walk away from them while its members thumb their collective noses at the agreement, and strike at will.

3. The Buffalo Forge Issue.

While BCOA respectfully submits that *Buffalo Forge* was wrongly decided, the Court does not have to face that issue here because this case (which is representative of the typical wildcat strike in coal) is clearly distinguishable from *Buffalo Forge,* 428 U.S. 397, 96 S.Ct. 3141 (1976).

Reduced to its bare bones, *Buffalo Forge* held that a "sympathy" strike is not enjoinable because of the proscriptions of Norris-LaGuardia against labor injunctions. *Buffalo Forge* defined a sympathy strike as one where one local union (having an on-going labor agreement and having no direct interest in the underlying dispute) ceases work in "sympathy" with a sister local engaged in a legal, primary strike against a common employer.

The majority reasoned that since the "underlying" dispute between the striking local and the employer was

not arbitrable, the "sympathy" strike was not "over" an arbitrable issue and, therefore, not enjoinable under *Boys Markets,* 398 U.S. 235 (1970).

The mere statement of this ruling and its context sharply distinguish *Buffalo Forge* from the typical wildcat strike in the coal industry. The question presented in the *Southern Ohio Coal Company* case could be put in these terms:

Whether or not under Boys Markets *a court which concededly can enjoin strikes over arbitrable grievances at their source, can also enjoin locals at other mines from striking to place increasingly mounting pressure on the particular employer and on the BCOA membership to forego their right to arbitration and capitulate to the union's grievance?*

To consider this question in proper context, it must be determined whether the strikes at other mines of the same and other employers are truly "sympathy" strikes in the meaning of *Buffalo Forge,* or whether they are merely extensions of the original economic pressure to force the employers, indivdually and collectively, to accept the union's interpretation of the National Agreement.

BCOA submits that this is the key to the issue.

The Nature of Wildcat Strikes In the Coal Industry

The *Southern Ohio Coal Company* case presents in clear focus the two typical phases of the wildcat strike as it is practiced in the coal industry. Wildcat strikes characteristically start with a strike at a local mine over some grievance or dispute which is clearly arbitrable under the National Agreement. The local union membership chooses not to arbitrate, and goes out on strike. Normally, one or more men walk out, and the others follow. The mine is then on strike. Unless the strike is spread by roving pickets, the single mine strike normally lasts a day or more; and the men eventually return to work. Strikes like those occur without fail every day in the coal industry. While damaging, these local strikes are not the worst problem. But, they are frequently merely the first phase in a larger strike.

The second phase of a wildcat strike occurs when the strikers at the originating mine fan out and picket out other mines. They do not always picket or move openly, but often do so covertly. They do not carry picket signs or proclaim their cause. They come to a mine in caravans, sometimes masked and with license plates covered, and shut it down. They then move on to another mine, returning later, if necessary, to shut down the same mines again. Their tactics are successful largely because of the coal miners' tradition of automatically ceasing work when a "picket" appears at their mine. It is also common practice for the miners at a mine closed by roving pickets to in turn picket out neighboring mines so that there is a growing momentum and a snow-balling effect to the spreading wildcat strike. This explains why only a handful of organized roving pickets can, within a few days, cause the shutdown of all the mines in an entire UMWA district, several districts, an entire State, several States, or the entire industry.

The History of the Southern Ohio Coal Company Dispute.

Typically, the strike at Southern Ohio Coal's mines did not start at Southern Ohio Coal, which is located in UMWA District 6 in Ohio.

It started at one mine of Cedar Coal Company in UMWA District 17 in Southern West Virginia in the summer of 1976. That strike was over an arbitrable issue. It fanned out until it shut down more than half of the unionized bituminous coal mines in the Nation. The Southern Ohio Coal mines were shut down by roving pickets. The Court of Appeals stated in its opinion that it was willing to assume "for purposes of this opinion" that the "stranger picket lines were established by a roving band of mine workers engaged in an illegal strike at another mine." In other words, it was assumed that the pickets had struck their own mines over an arbitrable grievance.

When Southern Ohio sought relief in the U.S. District Court, it was first granted, but eventually was denied on the basis of *Buffalo Forge*. The Court of Appeals for the Sixth Circuit agreed with the District Court.

We submit that the lower court misinterpreted and misapplied *Buffalo Forge;* and that in the interests of stability of labor relations in the coal industry, the Court should grant *certiorari* in this case.

BCOA submits that in this type of case, injunctive relief is clearly appropriate as a legal matter and is essential: (1) to preserve the integrity of the Agreement; (2) to protect the Health and Retirement Funds; (3) to secure an adequate supply of coal; and (4) to prevent chaos in the coal fields. We further submit that court relief is not prohibited by the *Buffalo Forge* ruling.

Despite the widespread occurrences of wildcat strikes in coal, BCOA does not believe that any more

than a few willful men are behind or supporting these strikes; and the UMWA's leaders have expressed the same opinion. Most of the coal miners idled by these strikes are victims, not willing participants. Most of them do not even know what the strike is about; nor do they have any interest in supporting the issue. They are out in response to "roving" or "stranger" pickets who have come to their mines and shut them down. Their failure to work is the UMWA member's customary and automatic response to the presence of pickets. This automatic reflex is supported by nothing more rational than tradition, but tradition has been enough to support the wildcat strike over the years.

BCOA makes these statements against the backdrop of years of tragic experience with similar widespread wildcat strikes. The truth is that because of the miners' tradition of not working in the presence of pickets, small bands of pickets are able to shut down large segments, and even all, of the entire coal industry.

Boys' Markets Provides the Legal Basis for Injunctive Relief And Buffalo Forge Does Not Preclude It

The holding of the Supreme Court in *Boys Markets* is well known and has been frequently applied to wildcat strikes in the coal fields. *Boys Markets* holds that where there is a labor contract in effect containing a binding grievance and arbitration procedure, there arises an implied agreement not to strike over an arbitrable dispute. In the event such a strike does occur, the federal courts are empowered to enjoin such strikes and to order arbitration of the dispute.

The courts have frequently noted the scope and breadth of the grievance-arbitration clause of the 1974

Agreement. Article XXIII, Section (c) of that Agreement provides for grievance-arbitration of differences arising as to the meaning and application of the provisions of the Agreement; differences arising over matters not specifically mentioned in the Agreement; or local trouble of any kind. This clause was given a very broad scope by this Court in *Gateway Coal Company* v. *UMWA*, 414 U.S. 368 (1974). That case involved a safety issue; and the Supreme Court extended *Boys Markets* to an injunction enforcing the implied no-strike clause in the then existing 1971 National Agreement, although the question of arbitrability of a safety grievance was itself a "substantial question of contract interpretation." 414 U.S. at 380-384. See, footnote 14 in Mr. Justice Stevens' opinion in *Buffalo Forge*.

BCOA submits that *Boys Markets* is applicable here. There was admittedly an arbitrable dispute at the original mine.

When other UMWA local unions such as those at Southern Ohio Coal Company were picketed and then ceased work, their actions were plainly designed to frustrate and to undermine the arbitration process. As the Supreme Court said in *Buffalo Forge*, "The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties." In giving approval to *Boys Markets* in *Buffalo Forge*, the Court stated further that,

> "Striking over an arbitrable dispute would interfere with and frustrate the arbitral process by which the parties had chosen to settle a dispute. The *quid pro quo* for the employer's promise to arbitrate was the union's obligation not to strike over issues that were subject to the arbitration machinery." 96 S.Ct. 3141, 3147 (1976)

It seems quite clear that the force and effect of the action of the Southern Ohio Coal Company locals was to join hands with the roving pickets in an effort to compel the original employer (Cedar Coal Company) to capitulate on an arbitrable dispute. Therefore, all locals engaging in and joining this concerted effort breached their implied obligation not to strike over an arbitrable dispute, and were subject to injunction under *Boys Markets*.

In the wake of *Buffalo Forge*, some confusion and uncertainty has been manifested by district judges and by courts of appeals as to its application to wildcat strikes in the coal industry. See also, *U.S. Steel Corp.* v. *UMWA Local 6321*, 548 F.2d 67 (3rd Cir. 1976). It appears that the lower courts have over-reacted to *Buffalo Forge*, which is understandable. We can appreciate the burdens sometimes imposed on the courts by court actions to enjoin these widespread and recurring wildcat strikes. But, when one party refuses to honor an agreement to arbitrate rather than to strike, we know of no way to enforce that agreement except through the courts of law.

The majority of this Court in *Buffalo Forge* pointed out the features of that case which differentiated it from *Boys Markets*.

The Court stated:

> ". . . The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of

> the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it were subject to the settlement procedures provided by the contract between the employer and respondents. *The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain.*" [emphasis added]

The situation presented here is wholly distinguishable from *Buffalo Forge*. Overriding all else, the essential difference between *Buffalo Forge* and this case is the one emphasized by this Court in the above quotation. In *Buffalo Forge,* the strike had neither the purpose nor effect of evading an obligation to arbitrate or of depriving the employer of his bargain. In this case, that was the whole purpose of the strike and the accompanying picketing.

The conclusion seems inescapable that all UMWA locals which went on strike in response to roving pickets were direct parties in a concerted effort to gain by force, rather than by submission to arbitration, their interpretation of the National Agreement. Thus, the purpose and effect of the activities of all those locals was to evade the contractual obligation to arbitrate.

Not even superficially can it be said that this was a "sympathy strike" within the meaning of *Buffalo Forge*. This is not a case where one union with a separate agreement in a separate employee bargaining unit respects the picket lines of another union negotiating for a separate agreement in a separate employee unit. In such a case, there is no arbitrable dispute other than the sympathy strike itself. That was the situation in *Buffalo Forge*. The union engaging in the

sympathy strike had no *direct* interest in the dispute between the striking union and the employer.

Here, all UMWA locals and their members are parties to the same National Agreement, negotiated between BCOA and UMWA "on behalf of its members". They have a direct unity of interest in any underlying dispute involving the meaning and application of any of the terms of their identical agreement. They stand to gain or lose equally from the arbitration of the issue, and to gain or lose equally from resolution of the issue by engaging in a wildcat strike. This is so because interpretation of the 1974 Agreement is a matter in which the members of BCOA and UMWA have an identical and direct interest. The arbitrator's ruling at one mine favorable to one grievant can benefit the members at all mines; and an unfavorable ruling can equally be detrimental to them. An enforced settlement by the use of economic force has exactly the same effect.

This situation is thus essentially different from that in *Buffalo Forge* where, as the Court pointed out, there was *no underlying dispute* "that was even remotely subject to arbitration."

Another distinction is that in *Buffalo Forge* the union originally on strike was engaged in a *legal,* primary strike and primary picketing. Here, the original strike was *illegal* and in violation of the 1974 Agreement. It would be paradoxical to find that the original strike was an enjoinable one, but that the strikes by other locals in aid of the same unlawful objective are lawful and unenjoinable.

Moreover, BCOA believes that the application of *Buffalo Forge* must be considered in the context of the

collective bargaining relationships which exist in the bituminous coal industry.

In *Buffalo Forge* there were two separate locals representing two separate "bargaining units". One was striking to obtain its own separate agreement. The other struck in sympathy.

By contrast, all bituminous coal miners employed by members of BCOA are members of a *single multi-employer bargaining unit.* The employers in that bargaining unit are all the members of BCOA. All UMWA miners employed by members of BCOA are covered by a single national agreement containing identical terms and conditions applicable to all of them. The Agreement is a national agreement negotiated between BCOA and the International Union.

The terms of the National Agreement apply alike to all members of UMWA employed by BCOA members; likewise their employers are all mutually bound to respect and to follow the common grievance-arbitration procedures. They also all are bound by Article XXVII, to ". . . maintain the integrity" of the agreement.

Vital to maintaining this "integrity" is the pledge to abide by the grievance-arbitration procedures for settling disputes. As members of the same bargaining unit covered by the same national agreement, each BCOA member and each UMWA member has an obligation to uphold the agreement and a duty not to engage in lockouts, in strikes, or in picketing over any dispute, no matter at what mine or what Company the dispute arises, so long as that underlying dispute is arbitrable.

If the situation were one in which there were a single plant-wide unit and contract, it would make no sense

to say that the employees in Department A who struck over an arbitrable grievance *could be* enjoined under *Boys Markets,* but that the employees in Department B who went out in "sympathy" *could not.* Clearly, in such a situation, the entire strike in a single bargaining unit would be enjoinable under *Boys Markets.*

Conceptually, although on a larger scale, the case just hypothesized is the situation between BCOA and the members of the UMWA under the 1974 Agreement. There is one national contract and one national bargaining unit. The miners at each individual mine of member companies may and do belong to various local unions. They have their own seniority lists and initiate their own grievances. But these locals do not constitute separate bargaining units. Their wages, hours, conditions, benefits, and seniority rights are negotiated between BCOA and UMWA and are derived from the one national agreement. Their grievances are processed under that agreement. Indeed, grievances go in progressive steps from the local to the District level and then to arbitration before panel arbitrators selected by BCOA and UMWA under the National Agreement.

Moreover, in the 1974 Agreement, for the first time, a provison was made for a National Arbitration Review Board which functions as the final arbiter of all disputes. The professed purpose and effect of this National Board was to bring about uniformity in the interpretation and application of the agreement.

Given the existence of a single agreement in a single multi-employer bargaining unit, and an arbitration procedure designed to insure conformity of interpretation, BCOA submits that all members of the Union employed by members of BCOA are mutually

bound to abide by the common grievance-arbitration procedures. In this unitary relationship, the concepts of "primary" strikes and "sympathy" strikes do not apply. These terms connote separateness of unions, units, and interests which does not exist here. All coal miners have a direct interest in the disputes of all other miners. Because of this close unity of interest among the members of the UMWA in the outcome of any contractual dispute, *Buffalo Forge* appears clearly inapposite.

The Norris-LaGuardia Proscriptions Against Labor Injunctions Were Enacted In a Context of Injunctions Against Primary Strikes, and Not in the Context of Mutual Compliance with Labor Agreements.

The Norris-LaGuardia Act which was enacted more than 40 years ago, was adopted in response to a growing trend of the courts to enjoin primary strikes on the ground that they were in violation of the Sherman Act, as creating a monopoly in restraint of trade. At that point, there was a direct confrontation between mangement and labor over the basic question of the rights of unions to represent employees and to engage in primary strikes. There was at that time no law or mechanism for certifying unions as collective bargaining representatives of employees or of enforcing, by law, the right of collective bargaining.

But, this was altered by the National Labor Relations Act in 1935, which was declared constitutional by this Court in 1937, which gave employees the right to select an exclusive bargaining agent and required employers to recognize and to bargain for agreements with such representatives.

Since that time, employee unions have exercised these rights and thousands of labor agreements are negotiated every year.

Once this relationship of collective bargaining comes into being, as it has in the coal industry, the appropriate emphasis should be focused on the maintenance of stability of employment under the agreement negotiated between mangement and labor.

That is the issue involved here. The simply stated principle embodied in the National Bituminous Coal Wage Agreement is that *both parties* shall "maintain the integrity of the agreement" during its term, recognizing that at periodic intervals there may be legal strikes or lockouts over the terms of a new agreement. A part of this mutual obligation during the contract term is the obligation of both parties to use grievance-arbitration procedures of the agreement to resolve disputes. This leaves no room for strikes or lockouts to force the other party to adopt the aggressor's unilateral interpretation of the agreement.

Otherwise, the concept of an agreed period of labor peace under an agreement for a fixed term becomes an illusion.

For the above reasons, BCOA supports the Petition for a Writ.

Respectfully submitted,

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APPENDIX

APPENDIX A

National Bituminous Coal Wage Agreement of 1974

ARTICLE III—HEALTH AND SAFETY

Section (p) Settlement of Health or Safety Disputes

When a dispute arises at the mine involving health or safety, an immediate, earnest and sincere effort shall be made to resolve the matter through the following steps:

(1) By the aggrieved party and his immediate supervisor. Any grievance which is not filed by the aggrieved party within twenty-four hours following the shift on which the grievant reasonably should have known of such grievance shall be considered invalid and not subject to further consideration under the grievance machinery.

(2) If no agreement is reached at step 1, the grievance shall be taken up by the Mine Health and Safety Committee and mine management within four days of the conclusion of step 1. A standard health and safety grievance form, agreed upon by the parties, shall be completed and jointly signed by the parties to the grievance.

(3) If no agreement is reached within four days after conclusion of step 2, the grievance shall be taken up at the mine by the UMWA district health and safety representative and a designated representative of the Employer. If the dispute involves an issue concerning compliance with federal or state mine safety laws or mandatory health or safety regulations, the appropriate inspection agencies shall be called in immediately and the dispute shall be settled on the basis of the federal or state inspector's findings with both parties reserving all statutory rights of appeal. If the dispute is not settled, a record shall be made of the position of the parties and the evidence at this step.

(4) If no agreement is reached at step 3 within five (5) days, the dispute shall be referred to an arbitrator for settlement in accordance with the procedure under Article XXIII, section (c), paragraph 4.

The grievant shall have the right to be present at each step, if he so desires, of the foregoing procedures until such time as all evidence is taken. A decision reached at any stage prior to step 4 of the proceedings above outlined shall be reduced to writing and signed by both parties. The decision shall be binding on both parties and shall not be subject to reopening except by mutual agreement.

Article XXIII—Settlement of Disputes

Section (a) Mine Committee

A committee consisting of at least three Employees shall be elected at each mine by the Employees at such mine. Each member of the Mine Committee shall be an Employee of the mine at which he is a committee member, and shall be eligible to serve as a committee member only so long as he continues to be an Employee of said mine. The duties of the Mine Committee shall be confined to the adjustment of disputes arising out of this Agreement that the mine management and the Employee or Employees fail to adjust. The Mine Committee shall have no other authority or exercise any other control nor in any way interfere with the operation of the mine; for violation of this section any and all members of the committee may be removed from the committee.

A Mine Committee member shall not be suspended or discharged for his official actions as a Mine Committee member. An Employer seeking to remove a Mine Committee member shall so notify the affected Mine Committee member and the other members of the Mine Committee. If the Mine Committee objects to such removal,

the matter shall be submitted directly to arbitration within 15 calendar days from such objection. If the other members of the Mine Committee so determine, the affected member shall remain on the Mine Committee until the case is submitted to and decided by an arbitrator. If the Employer requests removal of the entire Mine Committee, the matter automatically shall be submitted to arbitration within 15 calendar days after such request, and the Mine Committee will continue to serve until the case is submitted to and decided by an arbitrator.

Section (b) Arbitration Review Board

1. Within 60 days following the effective date of this Agreement, the United Mine Workers of America and the Bituminous Coal Operators' Association will establish an Arbitration Review Board composed of one representative of the UMWA, one representative of the Employer, and a chief umpire to be jointly selected by both parties. This 60-day period may be extended by mutual agreement.

2. The chief umpire jointly selected by the parties shall serve for the balance of this Agreement, unless removed by formal resolution adopted by either the International Executive Board of the United Mine Workers of America or the Board of Directors of the Bituminous Coal Operators' Association.

3. In the event of removal, resignation, death or incapacity of the chief umpire, the president of the UMWA and the president of the B.C.O.A. shall endeavor to select a mutually acceptable successor within 15 days. In the event the parties fail to agree, they shall request the aid of the Federal Mediation and Conciliation Service in selecting a mutually acceptable successor. The composition of the panel may be considered by the parties at the time when renewal agreements are being negotiated.

4. The presidents of the UMWA International Union and the B.C.O.A. shall jointly establish a panel of impartial arbitrators for each UMWA district. These panels may be changed, augmented or supplemented by mutual consent of the appointing parties. Arbitrators may be removed from a panel by either party upon 10 days advance written notice.

Section (c) Grievance Procedure

Should differences arise between the Mine Workers and the Employer as to meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

Disputes arising under this Agreement shall be resolved as follows:

1. The Employee will make his complaint to his immediate foreman who shall have the authority to settle the matter. The foreman will notify the Employee of his decision within 24 hours following the day when the complaint is made.

2. If no agreement is reached between the Employee and his foreman, the complaint shall be taken up within 7 working days of the foreman's decision by the mine committee and mine management. Where the committee consists of more than three members, the Employer shall have the right to meet with a maximum of three (to be chosen by the mine committee). The committee and management will complete the standard grievance form stating the Employee's grievance and the response of management.

3. If no agreement is reached by the committee and management within 7 working days after the complaint is taken up by them, the grievance shall be referred to a representative of the UMWA district, designated by the Union, and a representative of the Employer. Within 7 working days of the time the grievance is referred to them, the representative of the Union and the Employer shall review the facts and pertinent contract provisions in an effort to reach agreement. Unless both parties consent, no verbatim transcript of testimony shall be taken. Following the meeting, should they fail to settle the grievance, the representatives shall prepare a concise, joint statement. In the joint statement the Union and Employer will each set forth its views of the facts and its position on the contractual issues. The joint statement shall be signed by the representative of the UMWA district and the representative of the Employer. Neither the Union's representative nor the Employer's shall be persons who participated in steps one or two of this procedure.

4. In cases where the district representative and the representative of the Employer fail to reach agreement, the matter shall, within 10 calendar days after referral to them, be referred to the appropriate panel arbitrator who shall decide the case without delay. Cases shall be assigned to panel arbitrators in rotation. Unless testimony has been taken at step 3, at the earliest possible time, but no later than 15 days after referral to him, the arbitrator shall conduct a hearing in order to hear testimony, receive evidence and consider arguments. In cases where a transcript has been made at step 3, the arbitrator shall have the discretion to conduct a supplementary hearing at or near the mine site. In cases in which the parties have made no transcript at step 3, and the joint statement indicates that there is no question of fact involved in the grievance, the arbitrator may decide the case without a transcript and upon the basis of the joint statement of the parties, exhibits and briefs. The arbitrator's decision shall be final except as provided in paragraph 5 herein, and shall govern only the dispute before him. Expenses and fees incident to

the service of an arbitrator shall be paid equally by the Employer or Employers affected and by the UMWA district affected.

5. Either party to an arbitration, upon receiving a final award by a panel arbitrator, may petition the Arbitration Review Board to appeal the decision of the panel arbitrator. Such petition shall include a statement of the grounds for the appeal, which shall consist of one or more of the following:

(i) That the decision of the panel arbitrator is in conflict with one or more decisions on the same issue of contract interpretation by other panel arbitrators.

(ii) That the decision involves a question of contract interpretation which has not previously been decided by the Board, and which in the opinion of the Board involves the interpretation of a substantial contractual issue.

(iii) That the decision is arbitrary and capricious, or fraudulent, and therefore, must be set aside.

Upon receipt of such petition, the Arbitration Review Board shall review the decision of the panel arbitrator to determine whether grounds for appeal exist. If not, the Board will so inform the parties. If so, the Board shall review the decision of the panel arbitrator making whatever changes are necessary to assure that the final decision correctly resolves all contractual questions and issues presented, and is consistent with prior decisions of the Board. The Board's decision shall be made by majority vote, and it shall issue its decision within fifteen days. Following review, the Board shall countersign its decision and transmit a copy to each party.

Section (d) Fifteen Day Limitation

Any grievance which is not filed by the aggrieved party within fifteen calendar days of the time when the Employee reasonably should have known of it, shall be denied as untimely and not processed further.

Section (e) Earnest Effort to Resolve Disputes

An earnest effort shall be made to settle differences at the earliest practicable time. Where an Employee makes a complaint during work time, the foreman shall, if requested to do so, and if possible, consistent with continuous production, discuss the matter briefly on the spot.

Section (f) Employee's Right to Presence of Member of Mine Committee

Except where it will interfere with production, an Employee shall be entitled, at his request, to have a member of the Mine Committee present to assist him at any discussion with his foreman held pursuant to section (c)(2) of this Article.

Section (g) Right of Grievant to be Present

The grievant shall have the right to be present at each step of the grievance procedure until such time as all evidence is taken.

Section (h) Finality of Decision or Settlement

Settlements reached at any step of the grievance procedure shall be final and binding on both parties and shall not be subject to further proceedings under this Article except by mutual agreement. Settlements reached at steps 2 and 3 shall be in writing and signed by appropriate representatives of the Union and the Employer.

Section (i) Exclusion of Legal Counsel

Neither party will be represented by an attorney licensed to practice law in any jurisdiction in any of the steps of the grievance procedure except by mutual agreement applicable only to a particular case.

Section (j) Expenses of Chief Umpire

The expenses of the chief umpire, and his necessary office and staff expenses will be shared equally by the BCOA and the UMWA.

Section (k) Circulation of Approved Decisions

Panel arbitrators shall be furnished promptly with copies of all decisions entered by the Board. The chief umpire through his staff shall prepare a looseleaf binder which shall contain summaries of the Board's decisions with respect to contractual issues arising under the Agreement. The binder shall be organized along the lines of the Agreement and shall be indexed by subject matter and case title. The binder shall be maintained by the chief umpire through his staff on a current basis and copies of any pages changed to reflect new decisions shall be provided to the parties on a monthly basis.

Section (l) Waiver of Time Limits

By agreement the parties may waive the time limits set forth in each step of the grievance procedure.

Section (m) Settlement of Differences or Disputes During the First Sixty Days of this Agreement

During the first sixty days of this Agreement, or thereafter by a mutually agreed extension, the parties hereto agree to resolve differences or disputes covered by this Article in accordance with the Settlement of Disputes provisions of Article XVII of the National Bituminous Coal

Wage Agreement of 1971 which is adopted and incorporated herein by reference.

Article XXIV—Discharge Procedure

Section (a) Just Cause Required

No Employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement.

Section (b) Procedure

Where management concludes that the conduct of an Employee justifies discharge, the Employee shall be suspended with intent to discharge and shall be given written notice stating the reason, with a copy to be furnished to the Mine Committee. After 24 hours, but within 48 hours, the Employee shall be afforded the right to meet with the mine superintendent or manager. At such meeting, the Employee may request a member of the Mine Committee to be present.

Section (c) Suspension

If the Employer informs the Employee at the meeting between the Employee and the mine superintendent or manager that he still intends to discharge the Employee (or if no meeting was requested), the Employee remains suspended with intent to discharge for a period of time necessary to permit him to file a grievance and have it arbitrated. If the Employee does not file a grievance within five days of the notice of suspension with intent to discharge, the discharge shall become effective immediately.

Section (d) Immediate Arbitration

1. If the Employee or the Mine Committee believes that just cause for discharge does not exist, they may contact the UMWA District office within 24 hours after his meet-

ing with the mine superintendent to obtain immediate arbitration of the dispute, by-passing steps one through three of the grievance procedure.

2. The next available arbitrator on the panel shall immediately be assigned to hear the case.

3. The panel arbitrator selected shall hear the case within five days. At the conclusion of the hearing, the panel arbitrator shall at that time announce his decision which, except for review by the Arbitration Board, shall be binding on all parties. Following the hearing, the arbitrator shall forthwith reduce his decision to writing within 10 days. If the panel arbitrator determines that the Employer has failed to establish just cause for the Employee's discharge, the Employee shall be immediately reinstated to his job. If the arbitrator determines that there was just cause for discharge the discharge shall become effective upon the date of the arbitrator's decision.

Sectior. (e) Regular Arbitration

If neither the Employee nor the Mine Committee request immediate arbitration, the Employee shall be discharged at the conclusion of the fifth day of his suspension, and his case shall be processed in accordance with the provisions of Article XXIII (Settlement of Disputes).

Section (f) Compensation for Lost Earnings

In all cases where it is determined that just cause for discharge has not been established, the Employee shall be reinstated and compensated for lost earnings at his applicable straight and premium time rates prior to discharge. Provided, however, that such case shall be taken up within five (5) days from the date of discharge.

Article XXVII—Maintain Integrity of Contract and Resort to Courts

The United Mine Workers of America and the Employers agree and affirm that, except as provided herein, they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Disputes" Article of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract and by collective bargaining without recourse to the courts.

The Employer, however, expressly authorizes the Union to seek judicial relief, without exhausting the grievance machinery, in cases involving successorship.

APPENDIX B

BCOA Wildcat Strike Losses, 1973-1977

Years	Man-days Lost	Payroll Loss	Tonnage Loss	Trust Funds Loss
1973	529,200	$ 26,298,400	7,043,000	$ 4,817,400
1974	1,023,800	53,819,000	11,686,700	10,509,500
1975	1,417,400	78,752,200	15,826,000	22,153,200
1976	1,950,300	109,897,900	20,477,300	37,666,300
1977 [through April]*	630,900	38,137,900	6,648,100	12,896,800

*preliminary

APPENDIX C

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS

2021 K Street, N.W.
Washington, D.C. 20006
202-452-5156

Board of Trustees
Harry Huge, Chairman
C. W. Davis, Trustee
Paul R. Dean, Trustee

1950 & 1974 Pension Trusts
1950 & 1974 Benefit Trusts

NEWS RELEASE

Contact: Barbara Moldauer
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February 25, 1977—Losses of income from the current series of work stoppages in the coalfields have placed the 1950 Benefit Trust and the 1974 Benefit Trust in a very difficult financial position, the trustees of the United Mine Workers of America (UMWA) Health and Retirement Funds announced today.

The trustees said the situation is such that any further loss of income will require adjusting the scope of the Funds' health benefits package to bring expenditures within the bounds of the Trusts' financial resources. They added that these adjustments will take the form of cutbacks in the overall level of health benefits, or the elimination of certain benefits entirely, and that beneficiaries of both the Benefit Trusts will be affected.

Although losses in income have had an adverse effect upon the financial situation of all four trust funds, the two Benefit Trusts have been hardest hit. During the first two

months of this year, the 1950 Benefit Trust and the 1974 Benefit Trust have lost an estimated $1.6 million in income as a result of work stoppages and an additional $9 million because of inclement weather. Even prior to these losses, the two Benefit Trusts were experiencing severe financial problems.

The financial problems of the 1950 Benefit Trust first surfaced in May 1976, causing the Funds' trustees to request the settlors of the Funds (the United Mine Workers of America and the Bituminous Coal Operators Association) to authorize a reallocation of income from the 1950 Pension Trust to the 1950 Benefit Trust for coal produced during the months of May and June.

Additional losses of income from subsequent work stoppages forced the trustees to request a second reallocation, this time for the remainder of the contract period, which was approved on October 5, 1976. The second reallocation shifted a portion of the income originally earmarked for the 1974 Benefit Trust to the 1950 Benefit Trust, and to the two Pension Trusts.

At the time the second reallocation was approved, the Funds' trustees warned that future reallocations would be impossible, and that benefits could be maintained at their current levels only if coal production remained at maximum levels for the remainder of the contract period. At this point, neither the 1950 Benefit Trust nor the 1974 Benefit Trust has the resources to absorb any further losses of income, leaving the Funds' trustees no alternative but to cut back or eliminate health benefits if work stoppages continue.

The 1950 and 1974 Benefit Trusts currently provide health benefits for more than 800,000 active and retired mine workers and their dependents, as well as death benefits for the survivors of such mine workers.

MOTION FILED

AUG 1 9 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1565

SOUTHERN OHIO COAL COMPANY
AND OHIO POWER COMPANY, *Petitioners*

v.

UNITED MINE WORKERS OF AMERICA
UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 6
AND UNITED MINE WORKERS OF AMERICA
LOCAL NOS. 1980, 1886 and 1957, *Respondents*

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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LOCAL NOS. 1980, 1886 and 1957, *Respondents*

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America hereby moves, pursuant to Supreme Court Rule 42(1), for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered February 11, 1977. The motion is necessitated by the refusal of respondents to consent to the filing of the appended brief.[1]

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[1] Petitioners have consented pursuant to Supreme Court Rule 42(1).

The interest of the *amicus curiae,* the Chamber of Commerce of the United States, [hereinafter, the Chamber] is set forth in detail in its brief. To summarize, the Chamber of Commerce is the major association of business and professional organizations, both large and small, in the United States. The Chamber has a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000.

The erroneous decision of the Sixth Circuit has a major, direct impact on the ability of the Chamber's members to enforce a no-strike pledge, obtained in a collective bargaining agreement, when their employees will not cross an illegal picket line manned by picketers covered by the identical collective bargaining agreement. Moreover, the responsibility of union districts and internationals for acts of their locals is of equally great importance to Chamber members. In addition, the decision of the Sixth Circuit has an indirect effect on the Chamber's members in terms of its effect on the availability of coal, and the impact of that availability on the national energy policy.

The petitioners and the *amicus curiae,* Bituminous Coal Operator's Association, represent solely the coal and power industries. Because both the direct and indirect ramifications of the Sixth Circuit's decision are of national significance to a wide range of industry and business, it is particularly appropriate for this Court to consider the views of a national organization, the Chamber of Commerce, which represents such a diverse group of industry and business, both large and small.

For these reasons, it is respectfully requested that the motion of the Chamber of Commerce of the United States of America for leave to file a brief *amicus curiae* in support of the Petitioners be granted.

Respectfully submitted,

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AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, and a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interest of its member-employers in important labor relations matters vitally affecting those interests before the courts, the U.S. Congress and the Executive Branch and independent regulatory agencies of the Federal

government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

The questions presented in the instant case are matters of continuing interest to the Chamber and its members. First, the case presents the question of whether the district and international levels of a union have any responsibility to prevent or end repeated strikes by local members over arbitrable issues when the international has knowledge of those strikes. Second, the case presents the question of whether this Court's decision in *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976), precludes the enjoining of a strike in violation of a no-strike clause in a completely different factual context. In particular, whether *Buffalo Forge* precludes the enjoining of a strike where the primary picketers were engaged in an illegal strike, were not employed by petitioner, and where both the primary picketers and petitioners' employees were covered by the identical national collective bargaining agreement.

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[1] *E.g., Buffalo Forge* v. *Steelworkers,* 428 U.S. 397 (1976); *Connell Construction Co., Inc.,* v. *Plumbers and Steamfitters Local Union 100,* 421 U.S. 616; *Gateway Coal Company* v. *United Mine Workers of America, et al.,* 414 U.S. 268 (1974); *William E. Arnold Co.* v. *Carpenters District Council of Jacksonville, etc., et al.,* 417 U.S. 12(1974); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.,* 416 U.S. 115(1974); *N.L.R.B.* v. *Bell Aerospace Company Division of Textron Inc.,* 416 U.S. 267(1974); *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970); *N.L.R.B.* v. *Granite State Joint Board,* 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 517 (1971); *N.L.R.B.* v. *The Boeing Company, et al.,* 91 S.Ct. 1952 (1973).

The decision of the court below will not only interfere with the ability of Chamber members to enforce a contractual no-strike clause, and the national labor policy of promoting peaceable resolution of labor disputes through the parties' grievance-arbitration machinery,[2] but, by interfering with the supply of coal, will have a major impact on the ability of Chamber members to comply with the national energy policy by converting their operations from the use of oil and natural gas to coal.[3]

REASONS FOR GRANTING THE WRIT*

The Court of Appeals Erred in Refusing to Extend the Injunction to the United Mine Workers District and International.

The District Court found that members of the United Mine Workers District 6 and International, Executive Boards, as well as District 6 safety coordinators, had actual knowledge of the illegal strike activity at Petitioners' mines, and were present for discussions of those work stoppages (A-18a-19a).[4] Moreover, the District Court found that telegrams describing the July-August work stoppage had been sent to the Presidents of the UMW District and International and that pursuant to the UMW constitution, district

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[2] *See Gateway Coal Co.* v. *U.M.W.A.,* 414 U.S. 368, 377 (1974); *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[3] See the proposed National Energy Act, HR 8444, Title 1, chap 6, part 4, § 601 *et seq.*

[4] "A" references are to the appendix attached to Petitioners' brief.

* The amicus relies on Petitioner's Statement of Facts.

or local autonomy could be suspended to assure performance or enforcement of a collective bargaining agreement (A-19a-20a).

Despite these findings, and its conclusion that injunctive relief was appropriate against the locals, the District Court refused to enjoin either District 6 or the International. The court based this refusal on its conclusion that neither the District nor the International "instigated or provoked the current work stoppage" (A-22a).

On appeal, the Sixth Circuit similarly refused to follow ordinary principles of agency law and hold the District and International responsible for the authorized or ratified actions of its officers and agents (A-33a). The Court admitted that its holding was in direct conflict with that of other circuits[5] (A-33a).

We submit that the Sixth Circuit's decision not only conflicts with those of other circuits but is in direct opposition with the ordinary agency principles to be applied to proceedings such as this pursuant to 29 U.S.C. § 185(b) and (e)[6] as interpreted by this Court.

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[5] *See, e.g., Eazor Express, Inc.* v. *Int'l Brotherhood of Teamsters* 520 F.2d 951, 959-964 (3rd Cir. 1975); *Wagner Electric Corp.* v. *Local 1104, Int'l Union of Electrical, Radio and Machine Workers,* 496 F.2d 954, 956 (8th Cir. 1974); *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446, 455 (5th Cir. 1970), *cert. denied* 401 U.S. 963 (1971).

[6] 29 U.S.C. 185(b) and (e) provide in pertinent part:

> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents.
>
> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

United Mine Workers v. *Gibbs,* 383 U.S. 715, 736 (1966).

Moreover, the decision of the Sixth Circuit ignores the realities of the workplace by removing any burden whatsoever from those in the best position to cure admittedly illegal work stoppages, the union district and international, unless the employer can meet the totally unreasonable burden of proving that the district or international instigated or provoked the work stoppage. We suggest that the decision of the Third Circuit in *Eazor Express, supra,* takes a more realistic approach. There the court held that the international had to use all reasonable means to end an unlawful strike begun without their authorization:

> When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union . . . [the union is responsible] on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members. (Citations omitted.) *Eazor Express, supra* at 963.[7]

The instant case provides an even stronger factual basis for application of the principles enunciated in *Eazor*. In this regard, the UMW constitution expressly authorized the international to suspend district or local autonomy in order to assure performance or enforcement of the collective bargaining agreement.[8]

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[7] *See also, Wagner Electric Corp.,* v. *Local 1104 I.U.E., supra,* at 956 (8th Cir. 1974); and *Vulcan Materials Co.* v. *Steelworkers, supra,* at 455 (5th Cir. 1970).

[8] Unlike *Eazor* or *Wagner Electric Corp., supra,* at 956, the international made no attempt to exculpate itself from liability.

This provision demonstrates the international's assumption of responsibility for illegal acts of the local and its members. Moreover, we submit that it must be considered as part of the "consideration" for the employer's entry into the collective bargaining agreement and therefore is enforceable under 29 U.S.C. § 185. Thus, a triple basis is provided for application of the *Eazor Express* result to this case: the common law agency principle of apparent authority,[9] the Third Circuit's presumption that mass action is union action, and the international's assumption of responsibility for enforcement of the collective bargaining agreement.

Clearly, the approach of the Third Circuit better effectuates the intent of Congress in enacting 29 U.S.C. § 185 (*Eazor Express, supra* at 963), and deals with the liability of the international in a realistic manner. In the instant case, the Sixth Circuit has seemingly ignored the continual wildcat strikes in the coal industry, which make it a particularly appropriate industry for application of the "mass action" principle.[10] In any event, whether or not this Court agrees with the holding of the court below, the petition should be granted to resolve the dispute in the circuits and quell the proliferation of litigation on this issue.

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[9] *UMW* v. *Gibbs, supra* at 736 (1966); *Wagner Electric Corp.* v. *I.U.E., supra.*

[10] During fiscal 1975, there were approximately 300 *Boys Markets* injunction cases involving wildcat strikes in the Southern District of West Virginia alone. *Cedar Coal Co. et al.* v. *United Mine Workers et al.*, —— F.2d ——, C.A. 4, Nos. 76-1785, 1793, 1846 and 8239 (July 6, 1977), slip op. at 45. Unofficially reported at Daily Labor Reporter, (DLR) No. 133.

The Sixth Circuit Erred in Not Finding This Case to be Factually Distinguishable from *Buffalo Forge*.

Relying on this Court's decision in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), the Sixth Circuit affirmed the District Court's refusal to find the union in contempt for failure to comply with a previously issued "Boys Markets"[11] injunction. We submit that this case is clearly distinguishable from *Buffalo Forge*, and therefore under *Boys Market*, the Sixth Circuit should have found the union in contempt. Moreover, the Fourth Circuit's recent interpretation of *Buffalo Forge, supra*, in *Cedar Coal Co., et al.* v. *United Mine Workers, et al., supra*, DLR No. 133, is in sharp conflict with that of the Sixth Circuit here. For these reasons, the petition should be granted, at the very least, to resolve the unanswered questions regarding this Court's decision in *Buffalo Forge*.

Southern Ohio Coal and the union are both signatories of the National Bituminous Coal Wage Agreement (A-28a). This agreement contains a grievance-arbitration clause[12] which this Court has previously recognized to be of a broad nature, and to contain an implicit no-strike clause. *Gateway Coal Co.* v. *Mineworkers*, 414 U.S. 368, 376, 384 (1974); *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). This

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[11] *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

[12] Article XXIII, § (g) of the agreement provides as follows:

> Should differences arise between the Mine Workers and the employer as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically mentioned in this Agreement or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences at the earliest practicable time.

clause covers not only express provisions of the agreement, "but matters not specifically mentioned in this agreement [and] . . . local trouble of any kind [which may] arise at the mine." The dispute at issue here arose after "stranger" pickets (non-Southern employees) who were members of the union, who were covered by the same national agreement as Southern's employees, and who were engaged in an illegal strike, set up a line around Southern's mine. (A-37a); *see also, Cedar Coal Co.* v. *Mine Workers, supra.*

The facts in *Buffalo Forge* are completely distinguishable from this situation. There, it was stipulated that the primary strike was "bona fide and legal." *Buffalo Forge, supra,* at 403. Moreover, the primary strikers were employed by the same employer as the sympathy strikers and had *no* collective bargaining agreement, let alone being covered by the same agreement. *Buffalo Forge* at 400. Finally, the grievance arbitration clause in *Buffalo Forge* was nowhere near as broad as the one here, since it was limited to disputes arising under the provisions of the agreement and to trouble arising in the plant. *Id.* While here, as previously noted, the grievance-arbitration clause extended to both differences not specifically mentioned in the agreement and to local trouble of any kind.

Moreover, although the Sixth Circuit found that the arbitration clause's reference to settlement of "local trouble" facially covered this dispute, it refused to enjoin the strike on the basis that there was not an express no-strike clause (A-40a). We submit that this holding is directly contrary to *Gateway Coal Co.* v. *Mine Workers, supra,* where the Court held that the broad arbitration clause in this contract's predecessor gave rise to an implicit no-strike clause which was sufficient to justify a *Boys Market* injunction. *Boys Markets, Inc.* v. *Retail Clerks, supra* at 253 (1970).

Further justification for granting the petition sought here is provided by the difficulties encountered by the Court of Appeals in applying this Court's decision in *Buffalo Forge,* and the resulting problems this creates for both employers and unions who are unsure of their legal rights and remedies. These difficulties are demonstrated by the sharp divergence in interpretations of *Buffalo Forge* found in the instant case and in the Fourth Circuit's decision in *Cedar Coal Co.* v. *Mine Workers, supra.*[13]

While the Sixth Circuit refused to look at the underlying cause of the primary strike, the Fourth Circuit stated:

> We think the [Supreme] Court [in *Buffalo Forge*] meant to tie together the non-arbitrability of the underlying cause with the cause of the strike at issue so that, when the underlying cause is not subject to arbitration, a refusal to cross a picket line, generated by a strike over the underlying cause, is not a violation of a no-strike clause which is enforceable by injunction against the strike although it may be by arbitration.
>
> Following *Buffalo Forge,* it seems that where the underlying issue is not arbitrable, then a refusal to cross a picket line set up on account of that underlying issue, although the refusal may be arbitrable, may not be prevented by injunction pending arbitration (footnote omitted) slip op. at 48.

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[13] The collective bargaining agreement in issue here is the same agreement involved in *Cedar Coal, supra.* Moreover, the dispute at *Cedar Coal* is the one which gave rise to the illegal primary pickets in this case. (A-37a)

Accordingly, the Fourth Circuit held that an injunction could issue against sympathy strikers where the underlying purpose was to force the employer to concede an arbitrable issue to the primary strikers who were members of a different local.

The differences in interpretation of *Buffalo Forge* by the Sixth and Fourth Circuits do not end here. The Sixth Circuit totally rejected the contention that *Buffalo Forge* did not apply since Southern's employees would benefit from a favorable resolution of the dispute between the illegal primary pickets and their employer, stating that such a finding would be "highly speculative" (A-38a). The Fourth Circuit, however, in interpreting the identical collective bargaining agreement, found quite the opposite stating:

> We also bear in mind that under the two-tier arbitration provisions of the collective bargaining agreement, Article XXIII, the award in [the Local] 1759 case [which set up the primary line] would affect also Local 1766, for there are only three grounds of appeal to the Arbitration Review Board: that the decision of a panel is in conflict on the same issue with other panels; that the decision involves a new question of a substantial contractual issue; and that the panel decision is arbitrary, etc. slip op. at 57

In view of the foregoing, we submit that this Court should grant the petition here to clarify the scope of its decision in *Buffalo Forge*.

Finally, we note that the net effect of the Sixth Circuit's holdings that the district and international cannot be held liable for actions of the local and its members, and that a Boys Market injunction cannot be obtained under the facts of this case, is severely restrictive. Indeed, in some cases, it practically eliminates the avenues of relief for an employer whose facility is being picketed by illegal stranger pickets, and who also has a contract with his employees containing a broad arbitration no-strike clause and is willing to arbitrate any dispute with them.[14] The untenable position of an employer in such a situation is obvious.[15]

Moreover, we urge the Court to grant the petition here because of the substantial conflict among the circuits as to all three issues presented in this case. The substantial uncertainty presently surrounding these issues can only result in a proliferation of unnecessary litigation. In this same vein, we urge the Court to explicate its *Buffalo Forge* decision. As interpreted by the Sixth Circuit, *Buffalo Forge* destroys the progress that had been made toward effectuating the Congressional preference for peaceful, private resolutions of labor disputes following the decisions of the Court in the Steelworkers Trilogy[16] and *Boys Markets, supra*. Finally, we urge the Court to recognize the continual problem of wildcat strikes[17] in the coal industry de-

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[14] *See* Lowden, "An Analysis of Buffalo Forge," 45 G.W.L.R. 633 (1970).

[15] Petitioner has also presented this Court with the question of whether the Sixth Circuit erred in finding that the prospective restraining order of the District Court was overbroad. We submit that whether or not the order of the District Court was overbroad, the Sixth Circuit's admission of a substantial conflict among the circuits regarding the scope of prospective injunctive relief in *Boy's Market* cases, and its decision to take an admittedly middle ground is sufficient justification for granting the petition here (A-43a—51a). This case presents the Court with the opportunity to resolve this conflict.

[16] *See, supra* n. 2.

[17] *See, supra* n. 10.

spite the existence of broad grievance-arbitration clauses and implicit no-strike clauses. These strikes which shut down substantial portions of that industry have a potentially devastating effect on the nation's energy supply. The implications of these shut downs are of particular significance now that our national energy policy encourages industry to convert from the use of oil to coal.

CONCLUSION

For the forgoing reasons, it is respectfully urged that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Respectfully submitted,

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